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CIS

COURT-ORDERED SCHOOL BUSING

HEARINGS

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760

COURT-ORDERED SCHOOL BUSING

MAY 22, SEPTEMBER 30, OCTOBER 1 AND 16, 1981

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COURT-ORDERED SCHOOL BUSING

FRIDAY, MAY 22, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Staff present: Jim McClellan, chief counsel and staff director; James M. Sullivan, counsel; Grover Rees, counsel; and Craig Stern, counsel.

OPENING STATEMENT OF SENATOR JOHN P. EAST

Senator EAST. I would like to call this hearing to order and to convene it. The Separation of Powers Subcommittee of the Senate Judiciary Committee wishes to welcome everyone this morning.

We are going to begin consideration this morning of two bills that have been submitted to us. One is S. 1147, submitted to us by Senator Slade Gorton of the State of Washington, one of my distinguished colleagues. I certainly welcome him here this morning.

We also have a bill submitted by another very distinguished colleague, Senator Bennett Johnston, of Louisiana, who is proposing Senate bill 528. I welcome these two gentlemen this morning. I would like to make a very brief comment, and then we can turn to their statements.

In addition to their comments, we will have a panel of commentary involving three gentlemen whom we will take up in due course here.

Without objection, S. 528 and S. 1147 will be inserted in the record.[1]

We are beginning the hearings on these bills. We hope, at our earliest convenience, of course, to continue on with additional hearings. We are somewhat at a point where we cannot say precisely when that will be, but we intend to take it up as early as we can, consistent with the workload currently before the subcommittee.

We felt the matter was of sufficient importance, and we were delighted that our two colleagues here were taking the initiative on the issue. We did want to begin the discussion and the process of hearings and to move this along as expeditiously as we could, consistent with the other obligations the subcommittee is currently undertaking.

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[1] A copy of S. 528 and S. 1147 can be found in the appendix.

Again, I do commend my two colleagues for raising this issue. It is one of those critical issues in America today that many feel—and I will candidly put myself in that category—that the U.S. Congress needs to address.

It is one of those critical national issues that, in terms of policymaking, has fallen exclusively to the courts and to the bureaucracy, and at some point it does seem appropriate that the legislative body of the U.S. Government, namely, the U.S. Congress, ought to begin to take some sort of action on its own.

It is a matter of vital public importance. It is a major political issue. It has tremendous importance and ramifications in American politics. It involves problems of separation of power and federalism. We think it most appropriate, first, that the Senate consider it; and, second, that this subcommittee undertake serious and prompt consideration of it.

So, it is in that spirit that I, as chairman of this subcommittee, approach the matter. It is important, it is serious, it deserves a fair, extensive hearing, and it deserves some sort of final recommendation upon the part of this subcommittee.

So, once again, I commend my two very distinguished colleagues for taking the initiative in showing the leadership to try to move this in some direction where we can begin to resolve this very critical matter.

Having said that, I will not take additional time. I will turn to Senator Slade Gorton and let him speak on behalf of S. 1147. Then we will turn to Senator Johnston and let him speak on behalf of S. 528. Then we will turn to our panel.

Senator Gorton, I welcome you this morning.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Thank you, Mr. Chairman.

I am pleased to be here although, at this point at least, the witness chair outnumbers the subcommittee. I am particularly appreciative to Senator Johnston for allowing me to speak first and to you for allowing these two bills to be considered at the same time, even though mine is really quite recent.

The thrust of S. 1147 is to recognize the right of every student to have his or her school assignment determined in a racially neutral fashion. It is just that kind of treatment, I am convinced, that is the premise of the equal protection clause of the 14th amendment to our Federal Constitution.

Mr. Chairman, I am not going to read the balance of my statement. I would appreciate it being included in the record.

Senator EAST. That will certainly be done, Senator.

Senator GORTON. The members of the subcommittee are perfectly capable of reading it themselves.

I would like to go on and speak a little bit more philosophically, both as to how I arrived at this approach and why I think it is appropriate.

The other subcommittee of the Judiciary Committee which has dealt with busing proposals, primarily with the constitutional amendment proposals, and this one will, of course, hear a significant number of witnesses on the impact of mandatory busing in all corners of the United States. While I have read much of their testimony, I will defer to them on many of the specifics.

Personally, I came into contact with those specifics as attorney general of the State of Washington in defending a State initiative, which was passed by roughly a 2-to-1 margin by the people of our State, designed toward very similar ends to this bill and found to be constitutionally invalid by a district court and then by a 2-to-1 vote of the ninth circuit court of appeals.

That gave me an opportunity to read a number of the academic presentations on the ineffectiveness of busing as a desegregation tool and its adverse effects on racial balance in public schools and cities from one end of this country to the other.

But to find such facts and to base any bill which this committee should pass on such facts is, I believe, vitally important in the exercise of the responsibility of the Congress under section 5 of the 14th amendment.

In short, it is my view that mandatory busing, based solely on the race of the students who are subject to it—students who obviously have played no role in any segregation or even racial imbalance in their school systems, themselves—is something which should be ended.

I am equally convinced that it is something that will be ended by this Congress—that this Congress is going to take action in this regard. And, as a result, I think that we should work very carefully to see to it that we take the best and most effective course toward that end.

I am opposed at the present time to a constitutional amendment on the subject. It would be for a single purpose only. It would be to change a set of court decisions which, I believe, are on the down side and beginning to be limited now.

In any event, a constitutional amendment is very difficult to pass, as you know, both here and in the States. And, of course, we must face the fact that it is very difficult to change anything in our Constitution once it is placed there.

If we take a statutory approach to this problem, we will be able to experiment. If we have done something which is not quite right, we can always make a change in the Congress, and it has that degree of flexibility and ability to make changes which I believe to be significant.

When I began to work on the proposal which is now S. 1147, it was my inclination simply to assert Congress' right to establish rights under section 5 of the 14th amendment and to declare a congressionally created right to racially neutral school assignment.

Because I had an opportunity 2 or 3 years ago to teach a course in constitutional law and had used a textbook written by Gerald Gunther, a highly distinguished professor of constitutional law at Stanford, I exchanged considerable correspondence with Professor Gunther on this subject and have, as a result of his advice, somewhat changed the direction of S. 1147 simply from the point of view of its basis rather than its ultimate direction.

This bill recognizes the only constitutional right in this connection which has ever been directly asserted by the Supreme Court of the United States, and that is the right to be free of de jure, purposeful discrimination and segregation in the public schools of the United States.

Its thrust is that busing is not only unnecessary in the protection of that right but is actually destructive of it, and therefore there is also a right, which is not inconsistent with the Court-created constitutional right to be free of purposeful discrimination, to have one's assignment as a student determined in a racially neutral fashion.

In connection with his comment on the last draft of this bill, which you have before you now, Professor Gunther wrote to me—and I am quoting now—

> To return to the specifics, it seems to me that Section 2(c) is indeed the heart of your bill and that it is very good. As I see it, you have provided a ban on busing, not by acknowledging any Court-created constitutional right to busing and merely acknowledging, most importantly in my view, the Court-created right to be free of de jure, purposeful discrimination and segregation.

I believe that the chances that this proposal will be found to be constitutional by the Supreme Court of the United States are, while not free from doubt, nevertheless very good.

This approach differs profoundly from the approach of the State of North Carolina, which was overturned in the *Swann* decision in the early 1970's. It differs, from a legal point of view, from the approach taken by the people of my own State in passing initiative 350.

The States do not have a right to pass legislation pursuant to the 14th amendment of the United States. The Congress, under section 5, very clearly does.

It is, I think, certainly arguable and, in fact, is the theory of some of the bills on abortion which are before this subcommittee right now, that Congress may create a right pursuant to section 5 of the 14th amendment to the United States, and there are some members of the Supreme Court who have agreed with that proposition in voting rights cases and the like.

We do not go that far. I think that that premise stands on relatively shaky grounds. We simply recognize a right, which seems to me totally consistent with and, as a matter of fact, to be the heart of the equal protection clause of the Constitution of the United States to racially neutral treatment in school assignments.

I believe this to be superior to the other sets of bills in this regard, one of which, simply and very directly, deprives the courts of the United States of jurisdiction in this area, which I think is a red flag which courts would labor mightily to overturn, and those which abandon the high ground in connection with mandatory busing, to the present set of theories and simply limit the areas in which it can be used.

That kind of recognition that busing is really OK or, if not OK, at least something that we cannot do anything about and simply saying that you cannot go beyond a certain distance or it can only be utilized under certain circumstances, I think, psychologically creates a problem and probably will not result in any significant change from policies which are followed at the present time.

I believe that we should pass a proposal, if we are going to deal with this matter at all, which is based on the proposition that students—in this case—have a right not to be discriminated against on the basis of race and to provide that on a consistent basis throughout the United States.

As I said, I am convinced that the Congress, and this session of Congress, is almost certain to do something about this whole question of busing, and I hope it will be something which will be definitive and which may very well end the controversy which has now occupied us for some 10 or 15 years.

I present my bill in that hope with, also, the very real recognition that this subcommittee, the full committee, or the Senate may wish to use portions of it and portions of some other proposals at the same time. But I offer it as a different kind of solution, one quite consistent, I may say, with the views of former Senator Ervin from your own State, Mr. Chairman, on the precise direction in which we should go.

Thank you.

Senator East. Thank you, Senator Gorton.

I would just like to ask several questions of you for clarification, perhaps, as much as anything, not necessarily going to the concretes of your bill.

You touched on this yourself—which is somewhat of an intriguing problem we are encountering here in our initial hearings in the Separation of Power Subcommittee.

We have been dealing with the abortion issue, as you know. If you did not know that, you have been sleeping, or something. We were discussing yesterday this matter of trying to find a remedy, at least in the legislative process, statutory versus constitutional.

You know, the Human Life bill is an effort to try to deal with the issue through a statutory approach, which we consider an infinitely more modest approach than, say, attempting to amend the Constitution.

There, of course, is divided opinion on that, not surprisingly. We had witnesses yesterday who intimated it would be a horrendous thing—critics of the bill—to attempt to modify a Supreme Court decision—*Roe* v. *Wade*—by dealing with it as a legislative matter, as opposed to amending the U.S. Constitution.

Personally, I do not agree with their analysis, which is neither here nor there. Everyone has a little different angle on these things. I am not trying to impose my view on this issue or, indeed, on that one.

It is simply that, as one Senator on the subcommittee, I felt the bill was a modest way to address a serious political issue, but short of amending the Constitution, which I look upon as a court of last resort—that we do not like to undertake that lightly or casually. We only do it when we seem to have no other recourse.

I was wondering here if what you are suggesting is that you do not think the constitutional amendment approach to busing is the best approach.

I liked your point where you said that one difficulty with it is that it may be somewhat unnecessary in terms of what the courts are doing now anyway, and then you also note that it does lock you in and it is very difficult to ever change if the amendment does not turn out to be quite what you thought it would be in terms of its practical application or its interpretation by the courts. At least with the legislative approach, we can always amend, revise, or modify. This is a changing problem, too, here, and it would give us greater flexibility.

As I understand your position, then—not to try to force you into defending the whole abortion problem—I realize we did not invite you here this morning to do that—but just in terms of this issue, I see a parallel. I am not forcing you to.

You clearly feel that we need a statutory approach—I want to make it clear for the record—as opposed to a constitutional amendment. You do not foresee that that would be the way to go, at least at this point. You would prefer to try a statutory approach.

No one can foresee—neither you nor I—what the courts might do with it, let alone the Supreme Court. We might at some juncture down the road, of course, and everybody in this business reserves the right to change their mind.

But, as you see it right now and could reasonably project into the future, you would prefer that we approach it in terms of statutory change—whatever that might be—as opposed to a constitutional amendment?.

Senator GORTON. That is correct.

Senator EAST. That, I gather, is the essence of your position.

Senator GORTON. Mr. Chairman, in connection with the points that you have just made, there is a certain parallel in this approach to the problem and that of the statute which you heard testimony on in connection with abortion. There is also a rather profound difference.

As I started my thought process toward this bill, I was going down exactly the same road that that other bill is. For example, in this last letter which I received from Professor Gunther, he discusses in some detail the Supreme Court decision in *Katzenbach* v. *Morgan,* which is the constitutional basis for that direct statutory approach.

I want to emphasize that Professor Gunther opposes your bill in connection with abortion on policy grounds, but he does say this:

> The Helms Human Life Bill, by the way, rests on that broadest reading of the Morgan power. His bill is not constitutionally frivolous, given the Morgan case. But I suspect, and I indeed hope, that the Court will take back some of the Morgan language if and when it has to confront the Helms bill.

It is at least partly for that reason that there is a very significant division on the Supreme Court on the precise power of Congress—whether or not it can create new rights pursuant to the 14th amendment as opposed, simply, to recognizing and enforcing 14th amendment rights which are already there—that caused me, in a sense, to duck on this and not to utilize this bill, in the fashion of the other one, to attempt to create a right to racially neutral treatment, but simply to recognize one which I believe to be there and to be consistent with the right to be free from purposeful segregation.

It is the reason that any bill on this subject, whether it is Senator Johnston's, or my own, or anyone else's, in my view, is going to require a very strong set of factual findings by the Congress before it can be passed simply as a theory.

I am convinced that much of the reason that the U.S. Supreme Court has gone in the way that it has, authorizing and sometimes even requiring mandatory busing, is that it has not had all of the facts available to it—that a single court test involving a single school district in connection with facts does not come up with a set of studies and a set of conclusions which are applicable to the United States as a whole—and if, in fact, you can develop testimony in this subcommittee supporting the factual premises of this bill, or of Senator Johnston's bill, or of any other, that the Court is very likely to defer to us in this respect.

I am not asking the Court to reverse all of its previous cases. I think the Supreme Court of the United States now is coming to a reluctant recognition that the road it started down in *Swann* is a dead-end road, and it would like a way to get out of it, and that the best way to get out of it is a strong set of factual determinations as the basis for one of these bills on the part of the Congress.

Senator EAST. You make a number of excellent points.

Just to try to extract out of your comments one or two additional observations, at least as to where I see we are going in the Senate and on this subcommittee, one, I did not feel that the Senate needs to be timid in moving in terms of trying to anticipate every possible response of the judiciary.

The judiciary—with all due respect to it—is a vital component of the American system, needless to say, but they have precipitated the constitutional and policy problems we have here by coming in full steam, whether it is in *Roe* v. *Wade* or in some of these other areas, and they have precipitated not only constitutional crisis but a policymaking crisis. The legislative branch is, understandably, beginning to respond to that.

In a democracy, the major policy questions ought to be decided by the deliberative process of building consensus in the legislative chamber. To me, that is the fundamental bedrock of a democratic society's representative government.

We have so frequently been circumvented on that, whether it is abortion, busing, prayer, or many of these other very controversial issues coming before this committee.

Again, as one Senator, I am not easily intimidated by the idea that we have to go very, very slowly and we must make sure that we are absolutely perfect in every detail because, in the real world of constitutional law and policymaking, sometimes we have to move to see what the response will be from the Court.

The difficulty we have faced in the area of busing is that we have been repeatedly hammered, it occurs to me, by court decisions and administrative decisions that have well nigh exhausted the patience of the American public and American educators on this issue, so we are trying to find some way out of it.

Again, our constitutional lawyers—and I do not wish to ramble on here too long—particularly those who wish to defend the status quo, will invariably say: "Well, you can't do this, you can't do that." I often find with them that it turns out there is not anything you can do: You cannot take a statutory approach, you cannot take a constitutional amendment approach.

I begin to get the feeling—with all due respect to them—that they are really defending the political turf via arguments that you cannot do anything.

So, again, I commend you on your at least trying to venture into these troubled and murky waters. And, as you see it, as one person here proposing this bill, you are not interested in a constitutional amendment at this time, you are interested in trying to approach it through a statutory remedy, which seems to me eminently reasonable, at least as a point of departure.

Let us plunge in. Let us look at it. Let us examine it and see where it comes out. And maybe we can remedy it this way. Exactly what the response of the Court will be, nobody knows.

But I would repeat, I see no reason why we cannot begin the process. We owe it, in my judgment, to the country at least to begin deliberating the issue.

Let me, if I could, Senator Gorton, quickly get a little more sharply in focus and for the record what is the situation in the State of Washington. What is the nub of the problem in terms of the busing controversy?

Senator GORTON. I believe it to be unique, or very, very close to being unique. There have been no court findings of de jure segregation in the State of Washington.

The Seattle School Board was threatened with a lawsuit which would assert de jure segregation and was persuaded, as a result of that threat, to engage in a pretty comprehensive system of mandatory busing for racial balancing purposes—using that term, "racial balancing," in the technical, legal sense of meaning a change in racial composition not required by the law, not resulting from purposeful segregation.

The response to that was an initiative—a statewide initiative—promoted by an organization, primarily but not solely made up of people in Seattle, which would have prohibited busing for racial balancing purposes beyond the nearest or next-nearest school to the home of the student involved.

The Seattle School Board and certain other organizations immediately challenged the constitutionality of that initiative, it having passed by a vote of approximately 2-to-1 in the State as a whole and almost 2-to-1 within the city of Seattle itself.

The District Court for the Western District of Washington agreed with the challengers and found the initiative to be unconstitutional. I was then attorney general.

That decision was appealed to the Ninth Circuit Court of Appeals, which last June—11 months ago—no, excuse me, the argument was 11 months ago—which last winter, I believe, upheld the decision of the U.S. district court by a divided vote—by a 2-to-1 vote.

My successor as attorney general, I understand, will attempt to get a writ of certiorari to the Supreme Court of the United States on the issue.

There is a fair chance that the Supreme Court will accept that case because it does differ, by reason of the fact that this was not a busing program resulting from any finding of de jure segregation from other cases involving busing.

The constitutional defect, if any, of course, in such an initiative is simply the fact that the people of the State of Washington acting as a legislature are not the Congress of the United States and there is no direct reference to their power to act under the 14th amendment, as there is a direct reference to Congress in section 5 of the 14th amendment.

Senator EAST. Let me ask you one final question. On this matter of your bill—of attempting to, as you say, create a racially neutral policy as far as school assignment is concerned—personally, I would agree with you, that certainly is the import of *Brown* v. *The Board*. It certainly would be a reasonable reading, in my judgment, of the equal protection clause of the 14th amendment—a colorblind standard in terms of school assignment.

But do we not know, as a matter of court and administrative ruling, that race is and can be considered as a factor in various areas of dealing with this matter of race relations or dealing with matters of alleged discrimination based upon race?

I am not saying I buy the argument, but are you prepared to meet the challenge that, in effect, you would be trying to overcome Supreme Court rulings via a statutory approach? That is, you are almost saying, as an act of faith, you wish it were so—that the Court still adhered on its own terms to *Brown* v. *The Board* and a totally color free standard in the equal protection clause.

But we do know, do we not, as a matter of court ruling, interpretation, and practice, that they have not totally excluded? In short, they have backed off a bit from *Brown* v. *The Board of Education*—at least what we thought was the standard there, at least what we thought might have been the standard in the 14th amendment—and do allow race to be a factor to be considered.

Hence, in trying to eliminate it through statute, are you prepared to answer the critics who say we ought to be amending the Constitution rather than doing it through the statutory approach. This is the problem we are encountering with some of the opposition in the abortion case.

Senator GORTON. Mr. Chairman, as I said in answer to one of your earlier questions, we considered taking that approach—the approach which some of the bills take toward *Roe* v. *Wade*—and I decided to back off that approach. And so I think my answer to you is that we are not attempting directly to reverse Supreme Court decisions but, to put it more delicately, simply to guide the Supreme Court into a slightly different channel.

It is for exactly that reason that it is so necessary for Congress to make certain factual findings and to have a basis for those factual findings as a premise to passing this bill or, I think, any other statute, as opposed to constitutional amendment, on the subject.

You are entirely correct, of course, that the Supreme Court has said that race is to be taken into account under certain circumstances in connection with school assignments.

It has permitted that only in connection with a finding of de jure segregation—that is No. 1—and, second, only to the extent that it is necessary to cure the effects of that de jure segregation. It does not allow a second or a third round after de jure segregation has been ended simply because housing patterns change.

So that, at the very least, an approach of this sort which would prohibit any kind of racially conscious school assignments in the absence of de jure segregation—would make that limitation more clear.

My own inclination is that that may very well be the law at the present time, although the Supreme Court has never dealt with that question directly.

As a consequence, however, and because we want to get to the issue of school busing, which I think has failed in every respect, the key to this bill is section 2(c) which says—and I will read it once again to indicate very clearly the philosophical and legal approach which this takes—

> In the light of the other findings contained in this section, Congress concludes that racially conscious assignment of students to schools is not necessary to the enforcement of the right to be free from purposeful segregation and discrimination in school assignments. Congress accordingly determines that every student has the right to have his or her assignment to public school determined in a racially neutral fashion.

If the first sentence is true—if, in fact, it is not necessary to have racially conscious assignments to cure school segregation—the second sentence simply reflects what I am sure the Supreme Court itself would state to be the case as a matter of right under the 14th amendment.

It is vitally important that that first sentence be properly supported in the record of any set of proceedings leading to the passage of a bill such as this.

By the same token, if the first sentence is true, we will not be reversing *Swann*. We will not be reversing a single decision of the U.S. Supreme Court. We will simply be showing that the factual assertions upon which those cases were based were not valid and that therefore they are no longer applicable—not reversed, but no longer applicable.

Senator EAST. You see—and then I shall be silent—and I do not, again, wish to be mixing the issues, but in the Human Life bill it is, interestingly, that same kind of approach that is attempted there—a factual clarification of when life begins. The courts seem to have been operating on a different premise.

Here, you are hoping that by making a factual determination you might redirect the court in another direction, which, personally, I am not quarreling with.

Senator GORTON. I think this has certainly been usable in other areas.

Senator EAST. If the bill becomes law, we will simply have to wait and see what the courts' response to it will be. But, in any case, I do commend you for making the effort to begin this deliberation and discussion.

I think the statutory approach is the right one to take, in whatever form it might be, before one takes up the more serious problem of a constitutional amendment.

I have no further questions, so, if you have a final comment, please go ahead.

Senator GORTON. Mr. Chairman, the last thing I would like to say is that I hoped to stay and listen to Senator Johnston as well, who was very, very kind in permitting me to go first.

If he does not mind, at least after the first few minutes, I have a speech on the Capitol steps at 11 o'clock this morning. So it is not any lack of interest in his proposal——

Senator EAST. We could recess and go hear that speech.

Senator GORTON. I do not think it would be worth your while.

Senator EAST. Very well. Thank you, Senator. Without objection, your prepared text will be inserted in the record at this point.

[The prepared statement of Senator Gorton follows:]

PREPARED STATEMENT OF SENATOR SLADE GORTON

Mr. Chairman, I appreciate this opportunity to appear before the Subcommittee. I want to thank my colleague, Senator Johnston for accommodating to my schedule by allowing me to be the first speaker this morning.

Two weeks ago today I introduced S. 1147. This morning I would like to tell the Subcommittee why I introduced that bill and why I believe it offers the best approach for dealing with the busing issue.

The thrust of my bill is to recognize the right of every student to have his or her school assignment determined in a racially neutral fashion. It is just such treatment, I am convinced, that is the promise of the equal protection clause of the 14th Amendment.

In fact, it is a paradox that so many courts and school boards insist on curing an evil cause by assigning students to school on the basis of race by assigning students to schools on the basis of race. At the very least, such a dubious and drastic remedy should be followed only if there were overwhelming proof that it was an effective and the only means to solve problems created by unconstitutional segregation. Neither is the case.

Last week the Subcommittee on the Constitution heard testimony on mandatory school busing. Appearing before the Subcommittee at that time was Dr. David Armor. Dr. Armor is a Senior Social Scientist with the Rand Corporation in Santa Monica, California. Dr. Armor has been involved in a number of school desegregation cases as an expert witness, including a case concerning the Seattle School District, which I shall discuss. I hope that this subcommittee will take notice of Dr. Armor's testimony. I believe it will be particular helpful.

In addition, persuasive testimony on the ineffectiveness of mandatory busing was also presented by Lino A. Graglia, Professor of Constitutional Law University of Texas School of Law; and Nathan Glazer, Professor of Education, Harvard.

In 1978, the Seattle School District, in anticipation of a possible desegregation lawsuit, initiated a mandatory busing plan. In 1978, largely in reponse to the Seattle plan, the citizens of the State approved Initiative 350 which prohibited the mandatory assignment of any public school student to a school other than the nearest or next nearest to his or her place of residence. The Seattle School District then sought to have the Initiative declared unconstitutional. As Attorney General of the State, I was charged with the duty of defending the Initiative. It was nevertheless declared unconstitutional by the U.S. District Court for the Western District of Washington, and that decision was recently upheld by a vote of 2-1 by the Ninth Circuit Court of Appeals. I understand that my successor as Attorney General, the Honorable Kenneth O. Eikenberry, has decided to appeal that decision to the United States Supreme Court.

My experience in defending the constitutionality of Initiative 350 not only left me with a feeling of frustration over the way in which the courts acted with such indifference toward the views of a large majority of people in the State of Washington, but also convinced me of the futility of busing as a social policy.

These two subjects are equally important. Other expert witnesses have testified and will testify to the dubious results of the busing experiment. I will concentrate on its unpopularity and the inevitable results of that unpopularity.

In Washington State, Initiative 350 was passed by an overwhelming 66.3 percent vote and with a 61.3 percent affirmative vote in Seattle itself. In the most recent session of the state legislature, there was additional legislative action taken on this issue. The legislature passed a measure which would prohibit the use of state funds for mandatory busing programs designed to achieve desegregation. The Governor let that measure become law without his signature and the matter is now in the federal courts, having been immediately challenged by the Seattle School District.

In 1979, in California, the voters approved Proposition 1, which prohibits mandatory busing to remedy de facto segregation.

Clearly, when the public is given the opportunity to speak on this issue the majority of those expressing an opinion are against mandatory busing as a method for achieving degregation. In fact, a plurality of black parents have opposed forced busing in a number of national polls. This is understandable since it is usually the minority students who are expected to carry the heaviest burdens in most such school districts. Recently, in fact, when it became clear that the busing program in Los Angeles would be ended, the school board invited any student who wanted out of busing and to go back to their neighborhood school to do so, 7,300 students immediately dropped busing; 4,300 of those were from minority groups.

It is not hard to understand why interest in the public school systems in cities with mandatory busing seems to be declining. Parents no longer feel that they have any control over their childrens' education.

There is no longer a sense of community involvement in the "local" school because there is no longer a "local" school—all schools become district schools. At a time when we should be rebuilding our cities, families with public school children are leaving them in large numbers.

While not all "white flight" can be attributed to the imposition of mandatory busing, in most cases about half of the decline in the white student population in cities where busing has been implemented can be attributed to that fact. Since 1974, when a busing program was ordered by the federal court for the Boston school system, that city's white population has declined from 57 percent of the total school population to 35 percent. Similarly, Denver's white student population has decreased from 57 percent to 41 percent, while in Los Angeles there has been a decline from 37 percent to 24 percent since 1978 alone. In an effort to desegregate in these cities, the courts and school districts have actually contributed, albeit unintentionally, to segregation. We should not and cannot continue to ask students to bear the burden of redressing wrongs in which they took no part and which occurred, in many cases, before they were born. It is time that we turn our attention and our resources toward improving our schools and the quality of education for all students.

There have been several bills introduced this session which attempt to deal with the busing issue through the vehicle of a constitutional amendment. I am opposed to any such effort. In my view, a constitutional amendment intended to cure a social ill should be a remedy of last resort. Amendments should be limited to the enunciation of broad principles of social policy rather than specific proposals addressed to what may be a transitory social issue. Moreover, with the exception of H.J. Res. 16, none of these proposals is, in my mind, sufficient in scope to deal with the problem. Generally, these bills limit only the federal courts and/or the executive branch from imposing a mandatory busing plan. They would not prohibit school districts from implementing their own plan, such as in the case of Seattle; or prohibit state courts, exercising concurrent jurisdiction to enforce Fourteenth Amendment rights, from imposing a busing plan. Proposals which attempt to limit the jurisdiction of the federal courts to hear desegregation cases, are also ill-advised.

The bill which I have introduced, S. 1147, is, in my view, the most suitable method for putting an end to mandatory busing so that we may get on with the job of revitalizing our public schools. Very simply, this bill prohibits the assignment of a student to a public school based upon his or her race. The bill would apply to all agencies of the executive and judicial branches of both the federal government and state governments.

The bill is an exercise of Congress' authority under section 5 of the Fourteenth Amendment. Pursuant to that section, the Congress may "enforce by appropriate legislation, the provisions of" the Amendment. Appropriate legislation, I am convinced, will be construed by the Supreme Court to include a determination of what remedies are and are not necessary to the accomplishment of a compelling governmental interest pursuant to the Fourteenth Amendment. S. 1147 will constitute a congressional finding that busing, when balanced against other societal considerations is not an appropriate remedy in desegregation cases. (One can argue that since it has not produced results it is not a remedy at all—and, in some cases has served instead as a catalyst inducing increased segregation.)

Other bills which this subcommittee may have occasion to consider in this context take the approach of the bill introduced by my colleague Senator Johnston. Such bills attempt to limit the impact of busing plans by limiting the distance or the duration of the bus ride. While such an approach is a laudable attempt at a compromise, I believe it will create as big a problem as the one it attempts to solve. Courts and school districts will face an enormous task in formulating such plans and would be constantly liable to attack over the question of precise compliance with the parameters of any such program.

We should address the busing issue forthrightly and clearly. It is time for Congress to state its position unequivocally. I believe that S. 1147 is constitutionally sound, will withstand judicial scrutiny and is the proposal which is the least intrusive upon our judicial and educational institutions.

Senator EAST. Senator Johnston, we certainly welcome you this morning.

We are also honored to have with us Representative Henson Moore from Louisiana.

We are honored to have you both here, gentlemen.

Senator Johnston?

Senator JOHNSTON. Thank you, Mr. Chairman.

Mr. Chairman, S. 528, the Neighborhood School Act, is introduced on behalf of myself and Senators Laxalt, Thurmond, McClure, DeConcini, Hollings, and also by my distinguished colleague from the House, Representative Henson Moore from Louisiana—he hails from Baton Rouge and is an outstanding Congressman.

He has also to go make a speech this morning, and, if I may, I would like to defer to him to speak first.

Senator EAST. Fine.

Congressman Moore?

STATEMENT OF HON. W. HENSON MOORE, A U.S. REPRESENTATIVE FROM THE STATE OF LOUISIANA

Mr. MOORE. Thank you, Mr. Chairman. I appreciate the opportunity to be here before your subcommittee this morning. I appreciate being invited to be here to speak.

I very much appreciate the courtesy extended by the junior Senator from Louisiana, my good friend Bennett Johnston. This is really a field he has spent a great deal of time working in. He is the prime author of this bill, knows its background, and he is an authority on how it is to be implemented and how it was drawn and why it was drawn the way it was.

He suggested to me that I might be interested in this bill. His hometown and my hometown are currently in the throes of this very social issue of busing.

Certainly, I was interested, looked at the bill, saw great merit in it, and agreed to sponsor it on the House side, and we have done so as House bill 2047, the exact companion of Senate bill 528.

What I would briefly like to do this morning is just simply say that I really think that the problem we are facing today, Mr. Chairman, is one of abdication by the Congress of a most important issue and a most important legal problem that we really should have addressed a long time ago.

I think our citizens in my State of Louisiana are really outdone with the Congress of the United States—black and white—for not having done so.

I commend you for holding these hearings. I think this is a beginning. I commend the Senator from Louisiana for having introduced a bill as that is a beginning.

I am simply here to say that I think this is the only game in town. The House of Representatives, to the best of my knowledge, is not going to address this issue. It sits in an unfavorable Judiciary Committee where hearings, in all probability, will not be held and action will not take place.

If anything is going to be done to finally address this issue, as it should have been done years ago by the Congress of the United States, it is going to start right here in this subcommittee and, hopefully, progress into markup through your full committee to the Senate floor, and then maybe we can force some sort of action on the House side.

I commend you for taking this action and tell you that I really think that is going to be the only way it is going to be done.

We have abdicated, as I said before, this issue. To me, it has become a social issue more than one of education. What we are talking about today, I think, is simply a social policy of forced racial mixing, ignoring where people live.

That is being done, not to help education any longer, as desegregation started, and rightfully so. What we are doing now is really just a social mixing of people against their chosen living patterns.

We ought to take a look at what busing is doing to public education. I think that is what this bill addresses, that is the purpose of this hearing.

It is not popular to come out and face this issue one way or the other. The black constituents are nervous, the white constituents are nervous, and no matter which decision we take, we wind up losing political ground and losing political support for having done so.

But the point is, the issue needs to be addressed by somebody. We are leaving this issue to be decided by the Federal courts and the Justice Department. Mr. Chairman, I think that is really a very cowardly act on the part of the Congress. We are not doing that with spending, we are not doing that with any other issue you can name, but we have done it here, and I think this is a real mistake.

I think our school systems are in turmoil across the country. We are finding consent decrees entered in one State that provide for one type of busing plan, and a consent decree demanded by the Justice Department and a Federal judge in another part of that same State offering a different busing formula. It does not seem to make much sense.

It is about time the Congress looked at this to see if there is legislation we can pass that addresses the issue.

I want to make one thing abundantly clear at the outset. The issue, in my mind, and I think the Senator's as well, is not desegregation. That is the law of the land. We support that.

There is a whole new wave of politicians coming out of the South—and I count myself in that number—and desegregation is something we support. What we are talking about now is the survival of public education—quality public education. That is the issue now, not desegregation.

Busing is merely something that was thought to be an implementing factor of desegregation. I submit it has gone far beyond that now. It is a social issue of whether we are going to force the mixing of people beyond where they live and then look at its impact on education.

I see three basic problems—and I will touch on them very briefly—associated with this policy of busing. One is the white flight. The whites are leaving the public school systems. Second is the fact that we are finding a decline in support for public education in my State—and I think this is probably true around the country. Once parents remove their children from the public schools, they stop supporting the taxes on bond issues that support the public schools. Third is the cost of busing plans to the local school systems. This is something we are very mindful of this day and time in the Congress of the United States.

Looking first at white flight—and I do not mean to preempt the Senator, but the only figures our State has right now happen to be of his hometown. When busing started in 1974, the school system was 60 percent white. The white enrollment has now declined by some 10,000 students and it is believed to still be declining.

Figures from around the Nation show that the experience has been the same in other parts of the country. In Detroit the system was 60 percent black in 1970 before desegregation, and now it is more than 80 percent black.

Actually, in Detroit today, we have the busing of black students from one black school to another black school, which seems to me to be somewhat ridiculous. I do not really understand what the purpose of this type of busing plan is.

We find that in Denver the white population was 64 percent in the school system in 1969 before busing. In 1978, it was down to 45 percent.

In my own congressional district, I have seen the same thing happen. I have seen white flight in the rural parishes that were forced to bus earlier. Now, in the major metropolitan area of Baton Rouge, the same thing is beginning to happen.

I have seen the springing up of private schools where there were none before, where the people did not have the money for them, there was no religious motivation for them. There was only one reason: To escape what they believed to be a deteriorating public school system.

I have seen parents who do not have the money to send their kids to private schools make the sacrifices to do so because they've lost confidence in public schools. The wife goes to work, they scrimp, they take everything away from their family to save enough money to send their child to a private school.

The sad thing is that the private school systems are not funded as well as the public school systems are. Therefore, we have a situation in some of the rural parishes I represent where the private schools are not very good and the public schools are not either because they don't have full public support. We wind up with nobody getting the quality education that they once had before busing was ordered.

The second point I would make concerns the decline in public support for public schools. In Louisiana, we support our public schools through bond issues that are levied through property taxes. We have seen a tremendous decline in the approval rate of those bond issues since busing has been implemented.

I have two parishes in my congressional district where they have tried four times to pass bond issues for the public school system and the voters will not approve the issue, even though the only high school has burned down. The people will not vote for new bond issues to rebuild the schools. So we are left with the students in the public schools going to school in temporary buildings and in shells of buildings because of lack of public support.

The opinion of the school board association in Louisiana is that there is no question that there has been a very definite decline in public support for bond issues to support the public school systems since busing has begun.

Part of this, no doubt, is the high rate of taxation American citizens face today with social security taxes and Federal taxes, but they are also becoming very skeptical, and they are also becoming very mad. They are very upset with the public school system, and they are failing to support public schools for that and for other reasons, and I think that busing is a big part of that.

Third, there is the cost. At a time when we are having difficulty in raising money for public schools, at a time when this Congress is talking about cutting back programs that do affect people in an effort to save the economy of this country, here we have a program that is very expensive.

Let me give you some examples. In Dayton, Ohio, in the last 3 years I am told that they have spent some $26.5 million busing over and above what they spent before busing was ordered. In Detroit, in 1978, $19.3 million was spent for the court-ordered busing beyond what they normally spent. In Los Angeles, before their voluntary program was recently scrapped, they spent $24 million over and above what they normally spent.

And there is additional cost—cost for security. We are finding that you have to protect the buses—that there have been incidents where people have actually attacked the buses in the parking lots and destroyed them. We now have security, high fences, and guards to guard the buses.

Then there is the gas—the precious consumption of fuel—the buses themselves, the drivers, the programs, the compounds. All of this costs money, and we ought to take a look at what we could get for that money in terms of education.

Recently, I met with President Reagan on several issues, and I mentioned to him busing and hoped there would be a different policy coming out of this administration. He told me an interesting story—that he recently met with Mrs. Brown of the *Brown* v. *Topeka Board of Education* case.

Mrs. Brown is shocked that busing has gone as far as it has, said the President. It has gone to the point now that her own grandchildren are being bused from the school she wishes them to go to in their neighborhood to a school someplace else. She was appealing for a right, a civil right, and that right was won and should have been won.

Now we are talking about something far beyond that, and she has her reservations about the value of busing, as, I am pleased to report, so does the President of the United States.

A woman called my office yesterday in Baton Rouge. She was looking at the proposed busing plan there. She has four children of elementary school age. They were all going to go to a school 3 blocks from her home. Under the proposed busing order, her four children will all go to four different schools, none in her neighborhood. I wonder, and she wonders, exactly what the value is of such a plan.

I want to repeat: I do not see this issue as black versus white. Busing has become a buzzword, unfortunately, for those who think they are bringing back segregation and for those who fear it may be coming back. That is not the issue. Nobody intends that, least of all myself and, I think, the Senator from Louisiana.

What we are talking about is whether or not we are going to have public education—quality public education. That is the thing that I feel very strongly about.

I am not sure whether this bill that the Senator has drafted and I have cosponsored with him is constitutional. I do not know if it will work constitutionally or not. But I know this: It is a start. And I know that it is a bill that you ought to take a look at in your subcommittee at the drafting stage and a markup stage to see what we can do.

It may well be constitutional, it may well be a solution to our problems, and we certainly ought to have the political courage to stand up and tell blacks and whites alike that the time of demagoguery is over. The time of baiting races, black or white, is over. It is time we looked at the issue of what we are doing to the public schools, and it is about time we saw if we cannot find some way to rescue them and find some way to reconcile this issue of busing versus desegregation in our public schools.

I am very worried that if we really want to return to an elitist system in our society, as we had in this country in its beginning, where the landed gentry and the wealthy and the merchant class will send their kids to very fine private schools and the landed poor and the not so fortunate will be forced to go to inferior public schools.

If that is what we want, then do not address the issue. That is well on its way to happening. It is happening in my congressional district, in my State, and around the country. If that is what we want, it is happening.

If what we believe, however, is the fact that every single citizen of this country is entitled to quality public education, education of the masses, that it is their right to have that kind of education, and it is the duty of the Government to provide that kind of education, then we had better take another look at this busing issue because that is not what our students today are getting or are about to get in the eyes of the public and in numerous journals and reports.

Look right here at this month's issue of the Washingtonian magazine right here in Washington, D.C. You will find an article addressing the very subject of the superiority of private schools over public.

Lord only knows, the public schools my kids go to in Montgomery County, Md., are tremendously funded. The idea that they are not as good as private schools is something that is mind-boggling. When you look at areas like the one I come from in Louisiana, the difference is even greater.

I simply think that it is very timely for this subcommittee and for the Senate, and hopefully for the House to follow suit under your leadership, to begin to address the issue of what we are going to do about the right, and the guarantee of the right to quality public education. That is what I think is in jeopardy. It has nothing to do with desegregation any further.

I think it is about time that politicians and various interest groups stop baiting and stop demagoguery and begin to look at the issue and what it is doing to the school systems.

I am a product of public school systems. So is my family. So is my wife. We have both taught in them. I believe in them. I am committed to them. What I see happening I cannot believe is in the best interest of public education. I cannot believe there is any logic or any research that supports that busing is in the best interest of public education. I have seen it work just the opposite way in the 7 years I have been privileged to represent my congressional district.

Mr. Chairman, I thank you again for hearing me on these points. And I very much thank the Senator for bringing this issue to a head and for allowing me to proceed out of order. His courtesy is something I have always appreciated, and it is something that I very much appreciate again today.

Senator EAST. Thank you, Congressman.

The record will be kept open for the purposes that you stated. We thank you for coming and contributing.

Senator Johnston?

STATEMENT OF HON. J. BENNETT JOHNSTON, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator JOHNSTON. Thank you, Mr. Chairman.

Mr. Chairman, American education is in crisis and Louisiana schools are in turmoil. This is a crisis, a malady, a turmoil, which is self-inflicted, which need not have come about. It has been inflicted on ourselves by our own courts in this country, by massive, unnecessary, unreasonable court-ordered busing.

In 1971 when the Supreme Court began with what was a very idealistic experiment with busing, many experts believed that it would, in fact, result in desegregation of the schools, that it would, in fact, improve the quality of education, and there were experts at that time who were so saying.

Instead, the decided weight of opinion from extensive and sophisticated studies taken since that time and with the benefit of experience shows that it has not resulted in desegregation. To the contrary, it has resulted in white flight.

It has not resulted in better education but, to the contrary, has resulted in lower quality of education, and, as a consequence, the schools have suffered, the people have suffered, and, most of all, education has suffered.

Mr. Chairman, we have no intention of turning back the clock, but we must act and must act now.

Mr. Chairman, I must tell you that on December 10, 1980, on the floor of the Senate when a bill that I consponsored was up for consideration and the question was whether to withdraw that bill because it was threatened with a Presidential veto or whether to proceed, I finally agreed to withdraw the bill, along with Senator Thurmond and others, because, frankly, I was given assurances that we would move quickly on this legislation.

If I may, I would read very quickly. I was having a colloquy with Senator Thurmond. I said: How quickly can we expect action? Senator Thurmond:

> As early as can be obtained. We appreciate the position of the able Senator from Louisiana. I assure him we do expect to pursue this matter at the earliest possible time.

I further asked Senator Thurmond, and he said: "If it is referred to the Judiciary Committee, it will proceed in the highest order." At another time, he said, "at the earliest possible time."

So here we are, Mr. Chairman, some 6 months later, and I am finally getting a chance to speak on this bill. I say that not in criticism of this committee but to urge and underline and emphasize the fact that we are in crisis in Louisiana.

I have the attorney for some school boards in Louisiana who is prepared to tell you about the extent of this. One of his school boards met yesterday from 4 to 12 midnight. He caught the 3 a.m. plane to be here. And they have not resolved the problem yet. That is in East Baton Rouge Parish.

We must move, Mr. Chairman, and move without delay. I hope the committee will do so.

Mr. Chairman, I referred to the fact that, since 1971 when we first began with the *Swann* case and the *Green* case to experiment with court-ordered busing, we have come a long way in term of what we know about busing.

First of all, we know, beyond any question, that busing has been rejected in the minds of the American people.

I have a written statement, Mr. Chairman, and I would ask that that be put into the record. My statement refers to the public opinion polls.

Public opinion polls have been consistent since 1971. Consistently, they have shown that the American public, both black and white, have rejected court-ordered busing.

The percentage of those opposing busing has never fallen below 72 percent. If you will look, for example, at pages 11, 12, 13 of my statement, you will find that in 1971 in a Gallup poll 77 percent opposed busing; in Harris in 1972 between 76 and 81 percent, depending on the formulation of the question, opposed busing; in Gallup in 1975, 72 percent opposed busing; in a Harris poll in 1976, 81 percent opposed busing; in the Gallup poll in 1981, 72 percent opposed busing.

It is consistent and clear throughout all of these public opinion polls that the public opposes busing—those who are subjected to busing, those who are not subjected to busing, in the North, the South, the East, and the West, in California—everywhere, people oppose busing.

In Boston, after 6 years of court-ordered busing, the Boston Globe poll of June 2 and 3, 1980, showed, by a 4-to-1 majority, both blacks and whites said they preferred to improve the schools rather than bus the children.

Mr. Chairman, a constitutional right cannot depend upon a plebiscite of the people. It cannot depend upon a vote of the people because the Constitution is designed to protect minorities. I quote these polls, not to say that the constitutional right should be subject to public opinion, but to emphasize that when it comes to school desegregation public opinion becomes substance. It becomes the fact.

To the extent that people drastically and overwhelmingly oppose court-ordered busing, they vote with their feet and they make it impossible to make court-ordered busing work. That is precisely what has happened.

Mr. Chairman, we hope that after this hearing today we will have a record that will show what the results of court-ordered busing are. We have undertaken a massive amount of research on this question. We have spent, my staff, myself, the Congressional Research Service, and others, literally hundreds of hours trying to find every expert in the field who has written or made a study on the question of the results of court-ordered busing.

I have here, Mr. Chairman, a bibliography, which I would like to submit into the record, on busing and school integration by the Congressional Research Service. I would offer this to show the number of studies and the amount of data that is now available. It is massive, it is absolutely massive, and I do offer that for the record.

We have extracted what we consider to be the leading studies on the subject.

I have this bibliography which I also offer for the record. These are Xeroxed copies of the leading studies. I offer them for the record, and I will have to leave it to the good judgment of the chairman whether to have them all printed.[1]

I would urge the chairman, to print at least the two studies by Armor and by Coleman. The Coleman study I think the chairman will remember.

Professor Coleman of the University of Chicago, in 1966, made the initial studies which provided the impetus for busing in the first place. At that time, he concluded that black children prosper educationally by virtue of being in a mixed situation. Although his 1966 study did not refer to busing as such, he did refer to the integrated educational experience.

In his later study on massive busing—his 1976 study—a copy of which we have here and which I offer for the record, he concluded that the exact opposite does take place—that it has resulted in white flight because when a large number of white pupils leave a public school system, the resultant pupil mix can be so heavily tilted toward minorities that desegregation is no longer possible.

Mr. Chairman, the David J. Armor study which I referred to studied court-ordered busing in large school districts and found what we all know to be the fact, but he found it from an academic, from a real factfinding point of view—that it has resulted in massive white flight.

In the majority of these districts, more than one-half of the white loss over a 6- to 8-year period was due to court-ordered busing.

In large cities—Boston, for example, in 1972, had 57,000 whites. By 1977, it was down to 29,000 whites—less than half. Of the total decline, about three-fifths or 16,000 was due to these court orders.

In Los Angeles, between the fall of 1979 when State-mandated busing was extended and the fall of 1980, white enrollment dropped by 18,515 students.

In St. Louis, between 1979 and 1980, 21 percent of the nonblack students left the system.

I urge the subcommittee and the staff to read these studies. I urge those on the panel who are to follow me to read the studies.

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[1] A bibliography, article, study, letter, and legal analysis submitted by Senator Johnston appear in the appendix. Other material referred to above is on file with the subcommittee.

Do not ignore the evidence. It is past time when those who, in the name of equal rights, in the name of due process, in the name of equal protection—all of which I am for—can ignore this evidence, Mr. Chairman. It is overwhelming.

It seems to me that those who are the leaders of the black community, who are the leaders of the school desegregation movement, ought to come with us and try to fashion a remedy which will work, one which will achieve the dual purpose of desegregation and a higher quality of education.

Mr. Chairman, our bill does precisely that. Its main features—and I will not go into it in great detail—are that, it puts limitations on time and distance for bus travel.

The time is 15 minutes additional time one way, or 30 minutes round-trip, over and above the time necessary to get to the school closest to the place of residence of the student. The distance is 5 miles, so that you can go 15 minutes or 5 miles additional over and above the school closest. Busing could proceed up to that distance.

It prohibits busing where it is likely to result in greater racial imbalance or result in a net harmful effect to education.

Unfortunately, up to this point, courts with knowledge that their orders were not going to work—and I am personally familiar with some orders of that sort—have felt compelled to proceed by the judgment of the Supreme Court, in effect, and order things that they knew would not work, they knew would be educationally unsound. This would prohibit that.

The bill also makes findings based upon the evidence. The evidence has shown that massive, unnecessary, unreasonable long-distance busing does not work, results in white flights, and deteriorates the quality of education. We make findings in this bill to that effect.

Finally, we allow for suits by the Attorney General under the Civil Rights Act similar to those that can be brought right now to enforce desegregation. We would allow the suits to enforce the limitations on busing.

Mr. Chairman, the really difficult thing—and I suspect that the chairman has been persuaded—as you mentioned earlier, you are persuaded that busing has not worked. You are persuaded that this evidence cannot be ignored. The question is: What is the appropriate remedy? How far can you go? How far should you go?

In section 5 of the 14th amendment, the key words are that the Congress may "enforce by appropriate legislation" the equal protection and due process provisions of the act.

The two leading cases on section 5 are, of course, *Katzenbach* v. *Morgan* relating to the 1965 Voting Rights Act and *Oregon* v. *Mitchell* relating to the 1970 provisions of the Voting Rights Act.

I am sure the chairman is familiar with those two cases. Both of them stand for broad grants of independent power to the Congress to determine—or to quote Mr. Brennan—"to determine whether and what legislation is needed to secure the guarantees of the 14th amendment."

The Court has stressed in those cases the fact-finding competence of the Congress, and it has stressed the broad discretion of the Congress.

Mr. Chairman, there is no question that there is language in both of these cases which fully supports the approach we have taken in this bill.

Can I guarantee to this subcommittee that my bill is constitutional? Of course not, because I do not care how much study a constitutional scholar does in this field—and I have done considerable, and I have talked to many scholars on it—there is no way you can tell, because there has been no attempt by the Congress up to this point to restrict the power of the courts using section 5 of the 14th amendment.

Both the *Morgan* case and *Oregon* v. *Mitchell* constitute an attempt by the Congress to, in effect, broaden the 14th amendment.

To be sure, the language used in both of those cases gives great comfort both to my bills and to other bills, but we cannot say precisely how far the Court would go because the Court has not ruled in this field.

There is another ground, of course, upon which these problems are attacked. One of them is suggested by Senator Helms in his bill, which would result in a use of article 1 and article 3 powers to restrict the jurisdiction of the Court.

Under article 3, of course, the Congress has the power to create the courts inferior to the Supreme Court and to provide for their jurisdiction.

The right to create the court implies the power to abolish the court, and there have been cases on this prerogative. The power to abolish the court would, it is reasoned, give the power to restrict enforcement of a right, to provide for an interstitial statement of the remedy by which the court can or cannot proceed. That is, in effect, the argument of those who would use that approach of restriction of remedy.

Mr. Chairman, I have come to the conclusion that you cannot deprive the court totally of the power or of the jurisdiction to order busing, first, because the 5th amendment, which brings forward the protections of the 14th amendment, prevents the Federal Government from depriving a person of due process of law or equal protection of the law, and the Supreme Court has said, in effect, that these rights are, in effect, due process and equal protection rights.

Second, there is a respectable body of scholarly opinion, particularly of Professor Rotunda who has written a very interesting article which I would commend to you on the congressional power to restrict the jurisdiction of the lower Federal courts and the problem of school busing. It is a 1976 Law Review article in the Georgetown Law Review.

His thesis is that the power to abolish courts does not include the power to engage in what he calls narrow, individualized, interstitial removal of jurisdiction.

Again, we do not know the reach of article 3 powers of the Congress, nor do we know the reach of section 5 of the 14th amendment reach of the powers of the Congress.

What I can tell you is this, Mr. Chairman: Our bill does not abolish all remedies for school desegregation. It does not even abolish all remedies for court-ordered busing. What it does is select among remedies. It determines what is an appropriate remedy in light of the fact.

It is as if a doctor had been prescribing 10 aspirins at a time for a patient and we were able to come in and say 10 aspirins hurts the patient, if you give him only 2 aspirins it will help make the patient well. Courts have been overdoing what may, in some circumstances, be a necessary and in some circumstances be a good.

I believe—by not massively and frontally attacking the jurisdictional basis of the Supreme Court, by selecting among remedies that which is the most effective remedy to achieve not only quality education but, most effectively, to desegregate the schools, in light of this evidence—that this will stand up, Mr. Chairman, and I do not believe the other approaches—as much as I would like to see neighborhood schools everywhere—will stand up.

I think it is important that we act, that we act now. I must tell the chairman that it is my intention, at the earliest reasonable time, to bring the matter to the floor of the Senate, I hope with the endorsement of this committee. While I would like to wait for weeks of in-depth hearings—I really would—I think the record is overwhelming.

We do not need other experts to come in and tell us it does not work. We know that. It is written. It is studied. You cannot improve on these kinds of studies.

I hope what we can do is quickly move in this committee to come to the legal conclusions as to what the best approach is and that we can join together on what I think is a reasonable approach, and we can pass this legislation quickly. Education demands it, the cause of desegregation demands it, and, most especially, the schoolchildren demand it.

I would be glad to answer any questions you may have.

Senator East. Thank you, Senator.

First, allow me to clarify. I fully and completely share, as one individual, your sense of urgency about the problem, and I, too, would hope that we could come up with something at our earliest possible date.

I am sympathetic to your point that we have had a lot of experience with this. We have had a lot of study with it. We have ample polling to indicate sentiments which, as you are rightly saying, would not dictate the answer exclusively, but it is a factor to weigh. After all, ultimately you have to have some sensitivity to public feelings on highly important matters of this kind. You cannot be totally indifferent to them, at least not in a democratic society you cannot.

The ingredients are there to take action and, as I said, to move at the earliest possible date. I certainly want to clarify with you that I am in complete sympathy with what you are saying. We intend to move that way.

We, obviously, have a responsibility as a subcommittee, and I do as chairman, to see that we do justice to the subject, and I know you would not disagree with that. I am not asking that we have a colloquy on that, I just wanted to communicate to you my feeling that you are correct in that assessment. I do not have any quarrel with that at all.

Let me move on to an additional point just to get, if I might, for the record, your reflections on it, as I did with Senator Gorton.

Obviously, you feel the statutory approach is a good one, because that is what you are doing. Again, I have commended you for your leadership and your effort there.

What is your general attitude on this consitutional amendment approach on the busing issue? You have, obviously, some thoughts on it. I would like to hear those.

Senator **Johnston**. First of all, Mr. Chairman, I would support a constitutional amendment properly drawn, but I would not want to wait for it. It takes too long.

As you will hear from the next witness, the attorney for the Baton Rouge Parish School Board, we are under orders now, just entered days ago, that are tearing up our school system. We need some relief faster than that.

Second, I read section 5 of the 14th amendment giving us the power and the responsibility to select remedies.

Finally, a constitutional amendment still has to determine what to do. I think we have determined an appropriate thing to do here. I would support and vote for a properly drawn constitutional amendment, but I just think we should proceed quickly and now on what I believe is an area we have the power to act in.

Senator **East**. You, then, look upon this maybe as an interim measure. That is, you are not opposed to a constitutional amendment if it appeared down the road that could be obtained or was appropriate as things evolved. You are not ruling it out with a statutory approach, but you feel, again, the urgency of the matter is such that we need some interim relief and this, at least, begins to move us in that direction.

Senator **Johnston**. I would not look upon this as interim relief because I think we have the power to act with respect to school busing. I think we have that permanent power to do so, although the limits of that power have not been tested by the courts.

What I am saying is that I think we probably ought to go two-track so that we do not delay getting relief if the courts should disagree with what I think is irrefutable logic and should turn this or other bills down. Then we would at least be well on the way to the constitutional amendment.

If, on the other hand, this or similar legislation proved effective and held up in the courts, as I believe it would, then it would make unnecessary getting the action of the 38 States.

Senator **East**. You prefer, obviously, the more modest statutory approach to attempt to deal with a very pressing, real problem, and then the possibility of considering the constitutional amendment if that became necessary further down the road.

I, personally, Senator, have no additional questions. Your material here will be of great value to us, and so I will not belabor that in public or at least with the time constrictions that we have because we have three other gentlemen here that we do want to hear this morning.

Without objection, your statement will be included in the record at this point.

[The prepared statement of Senator Johnston follows:]

PREPARED STATEMENT OF SENATOR J. BENNETT JOHNSTON

The Neighborhood School Act

INTRODUCTION

Mr. Chairman and distinguished members of the Committee, I am indeed pleased to have the privilege of appearing before you in support of S. 528, the "Neighborhood School Act of 1981", which would place reasonable limits on the amounts of busing that Federal Courts may order. I believe, and I am prepared to present evidence to support that belief, that mandatory court-ordered busing, used to excess, threatens the twin goals of desegregation and quality education.

THE NEIGHBORHOOD SCHOOL ACT

The Neighborhood School Act amends the "all writs" provision of section 1651 of Title 28 of the United States Code to specify that Congress intends to establish an exclusive framework for fashioning corrective school desegregation remedies. The corrective framework applies whether federal courts exercise powers to adjudicate school discrimination cases under the Constitution, a federal statute or common law.

There is no dearth of remedies to eliminate the "vestiges" of state-imposed segregation. However, the remedies least likely to guarantee Fourteenth Amendment rights to students are excessive involuntary assignment and transportation of students by court order. The Neighborhood School Act takes three new and unique approaches to these problems.

First, the Act puts time and distance limitations upon the busing to be ordered by a court. The total daily time consumed in travel by school bus by any student may not exceed by thirty minutes the time in travel to the school closest to the student's residence. In other words, courts would only have authority to require up to fifteen minutes one way on a school bus over and above the time necessary to get to and from the school closest to the student's residence.

The bill also puts a distance limitation of 10 miles round trip or five miles one way as the maximum additional distance beyond the school closest to the student's residence. Both the time and distance limitations are to be calculated by the route traveled by the school bus and not on the map.

A second provision of the bill prohibits court-ordered student assignments or busing where such orders are likely to result in a greater degree of racial imbalance or a net harmful effect on the quality of education.

The third feature of the bill is authorization of the Attorney General to enforce the rights guaranteed by the Neighborhood School Act. If a student is bused or about to be bused in violation of these provisions, the student or his parent can complain to the Attorney General. If he is financially unable to maintain the legal proceedings in his own right, the Attorney General is authorized in the name of the United States to vindicate his rights to the same extent as he is empowered to do with respect to school desegregation cases.

Specifically, section 2 of the bill contains a series of Congressional findings relative to the efficacy of busing as a desegregation remedy and concludes that the assignment of students to their "neighborhood public school" is the "preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States." To implement this congressional policy, section 3 provides that: No court of the United States may order or issue any writ ordering directly or indirectly any student to the assigned or to be transported to a public school other than that which is nearest to the student's residence . . .

An exception to this general prohibition is provided for transportation that is required by a student's attendance at a "magnet", vocational, technical, or other specialized instructional program that is "directly or primarily" related to an "educational purpose" or that is otherwise "reasonable". A transportation requirement could not be considered reasonable, however, if alternatives less onerous in terms of "time in travel, distance, danger, or inconvenience" are available. The cross-district busing of students would also be deemed unreasonable, as would a transportation plan that is "likely" to aggravate "racial imbalance" in the school system, or to have a "net harmful effect on the quality of education in the public school district." Most importantly, section 3 would make it unreasonable, and therefore bar the courts from ordering the transportation of any student that exceeds by thirty minutes or by ten miles the "total actual time" or "total actual round trip distance" required for a student's attendance at the "public school closest" to his or her residence.

The Neighborhood School Act relies on Congress' broad powers under section 5 of the Fourteenth Amendment to provide a framework within which violations of the Equal Protection Clause may be remedied. As such, the legislation does not preclude courts from determining whether State action violates the equal protection rights of individuals as students or from enjoining offical policies of school construction or student assignment that result in the intentional separation of the races. The Act does not affect the authority of the courts to enforce remedies involving the reassignment of students between schools or the reformulations of attendance zones which do not place a greater burden on any affected child. Other commonly employed remedies—voluntary student transfers, the establishment of "magnet schools," and the remedial assignment of faculty and staff would continue to be available. Simply stated, what the Neighborhood School Act does is to recognize that conditions of segregation cause by unlawful State action can be effectively remedied without resort to coercive measures involving extensive reassignment and transportation of students under court order.

SCOPE OF CONGRESS' POWER UNDER SECTION 5

There can be little doubt that the Neighborhood School Act is a legitimate exercise of Congressional prerogatives under § 5 of the Fourteenth Amendment which affirmatively grants to Congress the power to enforce "by appropriate legislation" equal protection and due process guarantees. The Court has long recognized the critical role of Congress in the enforcement of Fourteenth Amendment rights. The most recent and comprehensive discussions of Congress' § 5 powers are found in *Katzenbach* v. *Morgan* and *Oregon* v. *Mitchell.* In *Morgan,* the Court upheld § 4(e) of the Voting Rights Act of 1965, which invalidated a New York literacy requirement for voting as applied to Spanish-speaking Puerto Rican residents, despite the Court's own earlier refusal to find that State literacy requirements violated equal protection. Justice Brennan, writing for the majority, characterized § 5 as a broad grant of independent power to Congress to "determin(e) whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Of particular significance was the Court's deference to Congress' judgment in framing remedies for constitutional violations: It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental service, the effectiveness of eliminating the State restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interest that would be affected by the nullfication of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.

The remedial standards in S. 528 could hardly find firmer constitutional support than in *Morgan's* broad formulation of Congress' § 5 powers.

Oregon elaborated further on the scope of congressional authority to enforce the Fourteenth Amendment in a challenge to a provision of the 1970 Voting Rights Amendments granting 18 year olds the right to vote in State and Federal elections. While rejecting 5 to 4 the application of the act to State elections, *Morgan's* recognition of Congress' power to remedy State denials of equal protection survived intact. Writing for the Court, Justice Black opined that "(t)o fulfill their goal of ending racial discrimination and to prevent direct or indirect state legislative encroachment on the rights guaranteed by the amendments, the Framers gave Congress power to enforce each of the Civil War Amendments. These enforcement powers are broad." Similarly, Justice Douglas concluded that "(t)he manner of enforcement involves discretion; but that discretion is largely entrusted to Congress, not to the courts." Stressing Congress' superior fact-finding competence, Justices Brennan, White, and Marshall urged judicial deference to congressional judgments regarding the "appropriate means" for remedying equal protection violations.

The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as "arbitrary," "irrational," or "unreasonable."

Finally, Justice Stewart, joined by the Chief Justice and Justice Blackmun, conceded equally broad § 5 powers to Congress to "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause," and to impose on the States "remedies that elaborate upon the direct command of the Constitution."

Section 5 of the Fourteenth Amendment and its case law progeny thus provide clear support for the busing restrictions contained in S. 528. The emphasis in *Morgan* and *Oregon* on Congress' special legislative competence in balancing State interests against equal protection demands is significant, particularly in light of the findings in § 2 of the bill. Issues concerning the harms and benefits of busing for integration purposes certainly qualify as "complex factual questions" and their resolution by Congress commands judicial deference. Not only is Congress best equipped to hold hearings and conduct investigations to determine the facts, it is best able to "assess and weigh the various conflicting considerations" associated with busing. A recent study of the bill by the American Law Division of the Library of Congress reached this same conclusion:

Of significance in evaluating these limits may be the language in the *Swann* decision which permits the district courts to deny busing when "the time or distance of travel is so great as to risk either the health of the children or significantly impinge the educational process." The *Swann* Court also acknowledged that the fashioning of remedies is a "balancing process" requiring the collection and appraisal of facts and the "weighing of competing interests", a seemingly appropriate occasion under *Morgan* for Congressional intervention. In addition, busing is only one remedy among several that have been recognized by both the courts and Congress to eliminate segregated public schools. Thus, the findings in § 2 of the bill relative to the harms of busing, particularly if supported by other evidence in congressional hearings or debate, may comport with the emphasis of Justice Brennan's opinion in *Oregon* on Congress's superior fact-finding competence, and therefore be entitled to judicial deference. By contrast, the dissenters in *Morgan* found § 4(e) of the Voting Rights Act failed to qualify as a remedial measure only because of the lack of a factual record or legislative findings.

These principles are particularly applicable here where Congress is not attempting to alter a substantive right under the Equal Protection Clause, but merely addressing remedies the courts may impose on segregated school districts.

The Neighborhood School Act in no way attempts to "restrict, abrogate, or dilute" the guarantees of the Equal Protection Clause in a fashion inconsistent with the *Morgan* and *Oregon* rationale. Nor would it result in a dilution of rights recognized by the Court any more than the expansion of the rights or Puerto Ricans in *Morgan* diluted, to some extent, the rights of English-speaking voters. The Act does not in any way promote the separation of races or the perpetuation of segregated public schools. Instead, by mandating judicial resort to remedies in the schools, the bill would effectively expand the rights of privacy and liberty of all students involved.

The Neighborhood School Act is not attempting to prescribe how the Court should decide a substantive issue. Nor does it purport to bind the Court to a decision based on an unconstitutional rule of law. S. 528 is entirely neutral on the merits of any asserted claim of a denial of equal protection effected by segregation. It is only after a decision is rendered mandating desegregation that the bill becomes operative, and then only to restrict the use of one remedy among alternative remedies. As stated by Professor Hart: The denial of any remedy is one thing . . . But the denial of one remedy while another is left open, or the substitution of one for another, is very different. It must be plain that Congress had a wide choice in the selection of remedies, and that a complaint about an action of this kind can rarely be of constitutional dimension.

Therefore, Congress' constitutionally vested powers to enforce the Fourteenth Amendment and to regulate the jurisdiction and forms of remedies of the courts of the United States provide ample support for the restrictions on the use of busing remedies prescribed by S. 528. Such legislative action, instead of constituting an intrusion into the judicial domain, is rather a healthy exercise of congressional powers in the political scheme envisioned by the Constitution. If the protective system of checks and balances is to retain its vitality in our constitutional system, congressionally legislated remedies for denials of equal protection must be accorded substantial deference by the courts. This is particularly true where, as in the case of S. 528, the enactment is strongly supported by provisions of the Constitution independent of the Equal Protection Clause. Congress is uniquely competent to determine the factors relevant to the right to a desegregated education, and in resolving the conflicting considerations concerning the scope of remedies. Its judgment as to necessary restrictions on the use of busing as a remedy should thus be upheld.

BUSING HAS PROVED TO BE AN EXTREMELY UNPOPULAR AND INEFFECTIVE REMEDY

It is not the intent of this bill to turn back the clock. Congress remains committed to the cause of civil rights and to equal protection of the laws. But in the decade since busing came into general use as one of several tools for implementing court-ordered desegregation, Congress and the American people have learned some things about schools and our society that we did not know before. A body of information has been developed through the increasingly sophisticated techniques used by social scientists in examining our institutions. With this testimony I am submitting a bibliography prepared by the Congressional Research Service of 501 books and articles which have appeared on this subject since 1976. In preparation for these hearings, members of my staff have attempted to familiarize themselves with all major studies which deal with the issue of mandatory busing; copies of those we believe to be the most significant are available for your consideration. You can see from this mass of material that refinements in gathering and interpreting statistics and designing projection models have brought us to a point in history where, to paraphrase Marshall McLuhan, the measurement is the message: it is becoming increasingly clear that people perceive mandatory, court-ordered busing as harmful, both to children and to the concept of quality education, that they act on these perceptions and that their actions effectively nullify the objective of court orders by increasing white flight and the resegregation of schools.

FINDINGS OF THE POLLS

If there is a single conclusion which can be drawn from the polls about public attitudes toward busing, it is that a very large percentage of the American people opposes it. For example, the same question was asked by the National Opinion Research Center (NORC) at the University of Chicago yearly between 1970 and 1978. The question read: "In general, do you favor or oppose the busing of (Negro/Black) and white children from one district to another." The percentage of persons opposing such busing in this nine year span never dropped below 75 percent. Other surveys taken over the last decade show a remarkable consistency in attitude:

From the Gallup Poll (October 8-11, 1971)—In general, do you favor or oppose the busing of Negro and white school children from one school district to another?

	Percent
Favor	17
Oppose	77

From the Harris Survey (March, May, August 1972)—Would you favor or oppose busing school children to achieve racial balance?

	Favor (percent)	Oppose (percent)
March	20	77
May	14	81
August	18	76

From the Gallup Poll (November 1974)—I favor busing school children to achieve better racial balance in schools.

	Percent
Favor	35
Oppose	65

From the Gallup Poll (May 31, 1975)—Do you favor busing of school children for the purpose of racial integration or should busing for this purpose be prohibited through a constitutional amendment?

	Percent
Favor	18
Prohibit	72

From the Harris Survey (July 8, 1976)—Do you favor or oppose busing children to schools outside your neighborhood to achieve racial integration?

	Favor (percent)	Oppose (percent)
All	14	81
Whites	9	85
Blacks	38	51

From the CBS News Poll (August 22, 1978)—What about busing? Has that had a good effect, a bad effect or no effect at all on the education of the children involved?

(In percent)

	All	Parents	White	Black
Good	12	12	9	35
Bad	50	48	54	27
No Effect	18	20	18	19
Depends	5	4	4	7
No opinion	15	10	15	12

From the California Poll (September 21, 1979 for the state of Calif.)—Do you favor or oppose school busing to achieve racial balance?

(In percent)

	Favor strongly	Favor moderately	Oppose moderately	Oppose strongly
State	8	10	18	60
Whites	5	8	19	64
Blacks	31	19	16	32
Hispanics	12	12	16	57

From the Gallup Poll (February 5, 1981)—Do you favor or oppose busing to achieve a better racial balance in the schools?

(In percent)

	Favor	Oppose	No opinion
National	22	72	6
White	17	78	5
Black	60	30	10

Boston has experienced six years of court-ordered busing. In the Globe poll of June 2 and 3, 1980, citizens of Greater Boston were asked: Has court-ordered busing in Boston's public schools generally resulted in better or worse education for black children?

(In percent)

	Better	Worse	Not much effect	Don't know
Greater Boston	17	28	36	19
Whites	16	29	36	19
Blacks (Boston)	18	10	56	16

Would you prefer to spend tax money to improve public schools in largely black neighborhoods, or have black children transported to schools in largely white neighborhoods?

(In percent)

	Improve	Transport	Don't know
Greater Boston	80	10	10
Whites	80	9	11
Blacks	81	9	10

Los Angeles experienced two years of state-mandated busing. In the Los Angeles Times poll of November 9–13, 1980, Los Angeles residents were asked:

Do you approve or disapprove of forced busing to achieve racial integration? Approve: 18 percent. Disapprove: 75 percent. Not sure/refused: 7 percent.

In a special election of November 1979, California voters by a two to one majority approved an amendment to the California constitution ending state-mandated busing. You are probably aware that the Supreme Court of California upheld its constitutionality on March 11 of this year, and on April 17, the Court of Appeals permitted local officials to dismantle the busing program in Los Angeles, allowing children to return to their local schools.

It must be emphasized that most Americans, black and white, support the idea of equality of educational opportunity. The same polls which indicate the pervasive dislike of mandatory busing show a high level of support for genuinely integrated schools, those in which there are substantial opportunities for contact between majority and minority students.

Gary Orfield, author of the extensive study "Must We Bus?" and himself a supporter of mandatory busing, concedes that increasing white support for integrated schools has been a clear pattern in studies of public opinion over the decades. He specifically cites a series of Gallup Polls done between 1959 and 1975 which indicate dwindling public opposition, especially in the South during the 1960's, the region and the period in which massive integration was concentrated. (Gary Orfield. "Must We Bus? Segregated Schools and National Policy." 1978. p. 109.)

WHITE FLIGHT: THE COLEMAN CONTROVERSY

When a large number of white pupils leaves a public school system, the resultant pupil mix can be so heavily tilted toward minorities that desegregation is no longer possible. This is the "white flight" phenomenon identified by Dr. James S. Coleman and described in his Urban Institute paper Trends in School Segregation 1968–73. It had long been known that middle-class families had been moving out from the large older cities into suburbs, leaving urban school districts with increased percentages of minority students, but Coleman was the first to indicate that school desegregation contributed significantly to the declining white enrollments in public schools. Ironically, Coleman's massive 1966 study, the Equal Educational Opportunity Survey (known as the Coleman Report), had provided the rationale for the use of busing as a tool to promote desegregation, and proponents of activist desegregation policies attacked him bitterly. In August of 1975, a Symposium on School Desegregation and White Flight was convened, funded by the National Institute of Education and hosted by The Brookings Institution. Although Coleman was a participant, the papers which emerged from the conference consisted entirely of rebuttals of his position. Reynolds Farley criticized his findings, and his claim that desegregation accelerated white flight was denounced by Robert Green of Michigan State and Thomas Pettigrew of Harvard who charged that Coleman had been selective in his choice of school districts and that their own reanalysis revealed no correlation.

There were three major criticisms of Coleman's study: that his conclusions were invalid because he did not look at enough districts; that "white flight" from central cities is a long-term phenomenon independent of desegregation; and that desegregation does not cause it because the same level of loss can be observed in cities whether or not they have court-ordered desegregation.

The most serious challenge to Coleman's findings was mounted by Christine Rossell whose own study, she held, demonstrated that school desegregation causes "little or no significant white flight, even when it is court-ordered and implemented in large cities." She said that her data contradicted almost every claim Coleman had made. But Rossell's later and more detailed analyses yielded results consistent with Coleman's. In fact, both Rossell and Farley have admitted publicly that Coleman's original findings were essentially correct; Pettigrew and Green, whose critique relied heavily on the original Farley and Rossell studies, have not been heard from. Contrary to popular and even, in some cases, scholarly opinion, Coleman's 1975 report has not been discredited, although the agencies which expeditied publication of the early critiques, the National Institute for Education, Brookings and the Harvard Educational Review, have been slow to publicize the later studies establishing his credibility.

WHITE FLIGHT: THE ARMOR STUDY

David J. Armor's 1978 study of court-ordered mandatory desegregation in large (over 20,000) school districts with a significant minority enrollment uses a demographic projection technique to estimate what the white enrollment would have been in the absence of desegregation. Armor found massive white flight: A substantial (double the rate projected as normal) anticipatory effect in the year before busing was to begin; a first-year effect four times as great; and a long-term effect four years later of twice the projected rate of loss. In the majority of districts, half the white loss over a 6–8 year period is due to court-ordered desegregation efforts. White flight accelerates the "tipping" process by which minorities become the majority in a school district and desegregation becomes resegregation: "Before the desegregation action in Boston (1972), there were 57,000 white students but by 1977, there were only 29,000. Of this total decline of 28,000, about 16,000 (or three fifths) is attributable to desegregation activities. As a direct result of court-ordered busing, Boston became a majority black school district in 1975. It is interesting to note, also, that minority enrollment stopped growing rather suddenly in 1975 . . . This shows that black flight—which has not been studied—may also be a phenomenon in court-ordered desegregation . . ." David J. Armor. White Flight, Demographic Transition and the Future of School Desegregation. The Rand Corp. August 1978. p. 24.

Statistics for various school districts undergoing court-ordered desegregation involving some degree of busing show substantial declines in white enrollment. The Los Angeles Times reported that between the fall of 1979 and the fall of 1980 (when the Los Angeles desegregation plan was extended to more grades than before), white enrollment in the Los Angeles school district dropped by 18,515 students or 12.8 percent. Minority enrollment grew by 1.2 percent. (Los Angeles Times, October 2, 1980). St. Louis offers an example of significant white enrollment losses between 1979 and 1980 (when mandatory reassignment of some students began). In the fall of 1979, non-black enrollment was 16,444. By the fall of 1980 that number had dropped to 13,244, a loss of 21 percent. (Data provided by analyst on the staff of the St. Louis School Board.)

Armor cautions that the white flight phenomenon comprises more than relocation of family residence: ". . . there are three major processes which can give rise to white flight from public schools: (1) residential relocation outside the district; (2) transfer of children from public to private schools; and (3) failure of new area residents to replace regular outmigrants who are leaving the area for reasons unrelated to desegregation . . . some white flight effects are manifested by the slowing down of white growth rather than the acceleration of white decline." Armor (1978) p. 15.

In metropolitan desegregation cases, he indicates, "private school transfers may well comprise a significant portion of white losses." In my own state of Louisiana, a court-ordered busing plan last year resulted in the establishment of a private school in Rapides Parish. Interestingly, the private school has black and white students as well as black and white teachers.

Armor concludes that "court-ordered desegregation, coupled with normal demographic trends, is producing increasing ethnic and racial isolation in many larger school districts. If this trend is to be stopped or reversed, other remedies need to be considered."

ALTERNATIVES TO BUSING

Other remedies do exist. Armor, discussing San Diego, states that voluntary methods worked well in that case, and may offer a viable alternative to busing in larger cities. Innovative programs, such as the extended day program in the Mary E. Philips Magnet School in Raleigh, N.C., achieve their purpose of voluntary integration while meeting the needs of single parents, working couples and their children. ("Extended Day Program in a Public Elementary School." Children Today. May-June 1979. p. 6-9)

The polarizing natue of busing plans and their requisite expense deflect attention and energy from the issue of educational quality. Improving the quality of the schools may well serve to desegregate those schools and their neighborhood, voluntarily, more permanently and with less tension, than is possible with pupil reassignment.

In some districts, the desegregation of the schools has not become a principal objective of either the white or black communities. David L. Kirp, in analyzing the history of the Oakland (California) school system over the past two decades, found that the issue of desegregation was handled politically within the district and was not taken into the courts. "As a result, race and schooling politics in Oakland—including current disinterest in desegregation—reflect the popular will as well as any politically derived solution may be said to do so." ("Race, Schooling and Interest Politics: The Oakland Story." *School Review.* August 1979. p. 307) The outcome was largely a reallocation of money and power within the school system, securing for Oakland's black community a "measure of distributive justice."

Other urban school districts are seeking to improve their educational facilities, increase minority hiring and develop magnet schools instead of attempting to desegregate mandatorily student enrollment. "The theory of Atlanta's educational leaders is that equal educational opportunity can be achieved through high quality education. If they are right, and if they can create the kind of productive, effective schools that all parents want, the system could become a showplace for urban American schools and a magnet pulling back the children of those who fled the city during the past two decades." Diane Ravitch. "The 'White Flight' Controversy." Public Interest. Spring 1978. p. 149.

The alternative to mandatory busing for desegregation include the development of magnet schools (schools established with special programs and curricula designed to attract students of all races), open enrollment policies, and majority to minority transfers (students of a majority race at one school are permitted to transfer to schools where they will be in the minority).

On May 4, 1981, the Department of Justice proposed a plan for desegregating schools in the city of St. Louis which would reward students who voluntarily transferred between black inner-city schools and white suburban schools with a free college education at a state university or college. The proposal tacitly concedes that further busing and court-ordered desegregation plans would be counterproductive in producing truly integrated schools in St. Louis.

ALTERNATIVE LEGISLATIVE APPROACHES WILL NOT WORK

Unlike other legislative proposals in the Senate and the House, the Neighborhood School Act does not run the same constitutional risks.

A. The "Student Freedom of Choice Act"—S. 1005

Senator Helms and others would attempt to give students "freedom of choice" in selecting any school in their public school district, including the school closest to the student's residence. Senator Helms would do so by limiting the jurisdiction of federal courts to do otherwise. The operative language of his bill is found in section 1207 as follows: No court of the United States shall have jurisdiction to make any decision, enter any judgment, or issue any order requiring any school board to make any change in the racial composition of the student body at any public school or in any class at any public school to which students are assigned in conformity with a freedom of choice system. . .

Article III, section 1, of the Constitution grants the Congress power to create courts inferior to the Supreme Court and to provide for their jurisdictions. S. 1005 reasons, in effect, that since Congress has the power to create or abolish courts and to grant, withhold or revoke jurisdiction, it has the lesser power to grant or deny remedies to Federal courts or to minimally alter some of their equitable remedies.

In an exhaustive law review article entitled "Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing," 46 Georgetown Law Journal 839 (1976) Professor Ronald D. Rotunda concluded:

> Congress asserted power to abolish any or all of the lower federal courts does not include the authority to engage in narrow, individualized, interstitial removal of jurisdiction. Because both the due process clause of the Fifth Amendment and various provisions within Article III restrict congressional power to limit jurisdiction of the federal courts, the proper test of constitutional rights. Under this test, Congress cannot use a jurisdictional limitation to restrict a substantive right. Congressional attempts to prohibit busing only in those cases where Congress thinks the lower court has erred would violate Article III by imposing a rule of decision on particular cases. Any broader anti-busing statute would violate the due process clause of the Fifth Amendment by forbidding busing even when it is the only means of enforcing the constitutional right to integrated schools.

B. The "Racially Neutral School Assignment Act"—S. 1147

Senator Gorton's bill, the "Racially Neutral School Assignment Act", would preclude any assignment of any student to any school which occurs in a race conscious manner. In effect, both the school broads and the federal courts would be required to ignore the race of a student for making school assignments in every circumstance. Furthermore, no court could order the assignment of a student to a school other than a school closest to the student's residence and which provides "an appropriate grade level and type of education for the student".

Senator Gorton's bill flies in the face of *Swann* and a host of other decisions which established the requirement that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Swann* requires that where there is racial imbalance in public schools brought about by discriminatory state action that there be race consciousness in dismantling the dual school system. *Swann* specifically requires busing where necessary and stated "we find no basis for holding that the local school authoritites may not be required to employ bus transportation as one tool of desegregation." 402 U.S. at 30.

Furthermore, the Court has suggested that the "assignment of students on a racial basis" is indispensable to the decisions and judgments in desegregation cases. In *McDaniel* v *Barresi,* 402 U.S. 39, 41 (1970), the Court concluded that "(any) other approach would freeze the status quo that is the very target of all desegregation processes."

CONCLUSION

Over the past ten years, however, busing has become the judicial instrument of choice. In many instances courts have issued busing orders which they knew would not work and which they knew would result in white flight because they felt compelled by prior decisions to do so.

The studies of Coleman and Armor represent a demographic finding of fact. In 1971, the Supreme Court prescribed a legal remedy, busing, for what it had identified as a societal malady, a failure to provide equality of educational opportunity. But the remedy when applied produced a crippling side effect: resegregated public schools with fewer students overall in attendance. If a doctor were to discover that the medicine he had given a patient had, instead of curing the patient, produced an unexpected and serious reaction, he would stop the medication and attempt to find a safer, more effective treatment. If he didn't change the medication and the patient died, you can bet that someone would sue him for malpractice.

The medication now being prescribed by the Court for the patient has proven to cause more harm than the disease itself. Senators Helms and Gorton, on the other hand, do not prescribe any medication at all for the patient's affliction and prefer the patient to continue in pain without relief. The Neighborhood School Act, however, recognizes that medication can in fact relieve the patient's constitutional affliction. The Act does not prescribe twenty aspirin where only two will heal. In effect, the Neighborhood School Act acts as a good doctor by prescribing sufficient medication to give the patient relief, but not too much to kill him.

Nobody is going to sue the Congress for malpractice, but that doesn't lessen our responsibilities to the American people. A mistake has been made, and now that we are aware of the damage that has been done, we have an obligation to correct it.

Senator EAST [continuing]. Again, I thank you for coming and getting us started on this very critical matter.

We will leave the record open for matters that you or Representative Moore would like to make a permanent part of this record.

Senator **Johnston**. Thank you very much, Mr. Chairman.

Senator **East**. Thank you, Senator Johnston.

Now, we will have, in effect, a panel of Mr. John F. Ward of Baton Rouge, La.—if you will please come forward—Mr. William Taylor, director of the Center for National Policy Review; and Mr. John Shattuck of the American Civil Liberties Union.

Gentlemen, I welcome you this morning.

We have Mr. John F. Ward, Jr., an attorney from Baton Rouge, La. Mr. Ward has had considerable experience with school desegregation litigation, and while he currently represents the school board in Louisiana he is appearing here this morning as a private individual, and he is not in any representative capacity.

We also have the pleasure of having Mr. William Taylor, director of the Center for National Policy Review at Catholic University Law School. He is an adjunct professor at that law school. He is a former staff director of the U.S. Commission on Civil Rights, and he has been actively involved in school desegregation litigation over the 25 years and is currently representing black plaintiffs or school boards, both, in litigation.

Finally, we have the pleasure of having Mr. John Shattuck, legislative director of the American Civil Liberties Union. Both witnesses are members of the Executive Committee of the National Leadership Conference on Civil Rights which is made up of 150 religious, civil rights, and other civil organizations.

I welcome all three of you.

If we might—we have done this with other matters, and it somewhat expedites it, I think, for all of us—we would have Mr. Ward speak, and then Mr. Taylor, then Mr. Shattuck. Or, if you want, we can reverse the order, gentlemen—Mr. Ward, Mr. Shattuck, Mr. Taylor—and then, having heard each other's comments, we can get into a discussion.

I would like to remind you all that your written remarks will be made a permanent part of the record, so it is not necessary that you read them. It saves a little money.

If you could, summarize, and make your points as concisely as you can, again, consistent with making your points. I am not trying to restrict you in terms of what you can say, but if you can, summarize your remarks, and then perhaps in the discussion we can get into things of principal concern to each one of you and I can become, then, a part of the dialog, and maybe we can develop a stronger record by doing that rather than reading too much, but if you want to read some, I would only ask that you do it somewhat selectively if you could, please.

Mr. Ward, I welcome you. If you would start off this discussion, we will be grateful.

STATEMENT OF JOHN F. WARD, JR., ATTORNEY, BATON ROUGE, LA.

Mr. **Ward**. Thank you, Mr. Chairman.

As you have indicated, I have prepared a brief and very hastily prepared statement which I have distributed to your staff. In fact, it was completed this morning in Senator Johnston's office after I got here.

I think he has indicated that we were under very difficult time constraints in being here, and in that connection I would appreciate it if you could also hold the record open with regard to additional information which we will try to provide the committee, which Senator Johnston had requested and which we simply, under the situation in Baton Rouge, have not had time to do.

We have been, since March—well, before that—preparing a plan under a court order, in a 5-day trial between the Government's plan and the board's plan, a month-and-a-half of court-ordered secret negotiations between the parties which were not successful, and finally a court-ordered—as of May 13—final judgment.

We are under constraint of next Tuesday for a motion for a new trial, a reconsideration. We had a board meeting last night, and over 500 people attended, from 4 o'clock until after 12 midnight—at least, when I left it was still going on—when I left to catch my plane to come up here—because of the unworkability of the court order.

As you indicated, I am here simply as a private citizen with some experience in these matters. I represent East Baton Rouge Parish School Board. I represented the Rapides Parish School Board. You might recall some publicity, even up here, on the Buckeye Three and the Forest Hill mothers—that is Rapides. And I have represented other school systems over the past 10 years throughout my State.

I am also general counsel for the Louisiana School Board Association, and I am serving my third term as a member of the board of directors of the National Council of School Attorneys.

I mention those only to say, not only have I engaged in the courtroom litigation of these matters, but in the day-to-day attempts of the superintendent, school board members, and their staffs to successfully implement a court order which the people and the patrons of their school system refuse to accept. I believe strongly in public education.

Congressman Moore is my Congressman. I am from Baton Rouge also, but I was born in Senator Johnston's hometown of Shreveport at the other end of the State.

I went to public schools all over our State—in the little town of Winnsboro, Monroe, and Shreveport, Senator Johnston's town, and Baton Rouge—and finally obtained my law degree from LSU. Three of my four children have graduated from desegregated high schools in Baton Rouge.

I believe in desegregation. I believe in public education. And I perceive a very grave danger facing public education due to restrictions and requirements that court decisions have drawn out of the short equal protection clause of the 14th amendment which simply says that no State shall deny any person equal protection of the law. That is simple.

But we moved from *Brown,* which I do not think anybody disagrees with, that assigning students to schools simply because of their race, or teachers also, is unconstitutional. I do not think anybody would disagree with what the Supreme Court said in *Brown*—that we need to overcome what had been done in the past and we need to do what is necessary to move black children in our Nation into the mainstream of American life.

But we are not doing that anymore. We are doing just the opposite because of court orders. We have moved from desegregating schools to racially balancing schools. That is what most of the recent court orders since *Swann* v. *Charlotte-Mecklenberg* came out.

That decision is probably the most cited by different parties for opposing views of any other decision of the Supreme Court. I cite it, I quote from it, I use it. If they thought the district court had been requiring a racial balance in each school as a matter of substantive constitutional right, they would have reversed.

But today, using *Swann* as a background, the exports employed by the Government or by the private plaintiffs to draw desegregation plans will state in the beginning of their plan that the purpose of it is to achieve a racial balance in each school.

They call it eliminating the racial identifiable of the school, and that means coming within a plus or minus 15 percent of the racial balance in the system as a whole. That is the approach the Government's expert took in Rapides. That same expert took the same approach in East Baton Rouge.

That is not school desegregation, that is racial balancing. You can call it eliminating vestiges of a dual system. You can call it eliminating racially identifiable schools. A rose by any other name is still a rose, and it is killing public education.

Parents generally, whether they be black or whether they be white, are used to socializing with functioning schools, churches, et cetera, in a community within the town that they live in. That is the normal, natural, American way of life. It is true throughout our Nation.

Yet, what the courts are doing here in order to attempt to solve the social problem in this Nation of racial prejudice and racial discrimination is placing the burden on the school systems who cannot do it because the school systems cannot control the people.

We cannot control the parents. We cannot make them stay in public education as opposed to private, and we cannot make them stay in this parish as opposed to that parish. And they are leaving the school systems. And, as Congressman Moore mentioned and Senator Johnston has mentioned, when they leave the school system, the school system deteriorates.

Nobody knows from day to day what the next court decision from on high is going to say. Nobody knows today that, if you get a court order and that court order says that you now have a unitary system, 6 months from now or 1 year from now a new decision will come out and what you thought was unitary was not.

That is what happened to Baton Rouge, for example. In 1970, Baton Rouge appointed a biracial committee to help it find a desegregation plan. I think it was the first school system to appoint voluntarily a biracial committee without a court order.

That biracial committee came up with a plan which it recommended to the school board and which the school board adopted, as I recall, without making a change. It was adopted by the district court, and no appeal was taken by either party. It put us in a pure neighborhood school system.

Baton Rouge, like many other metropolitan areas, grew from an older, smaller city located on the river. It can expand only north, south, and east. It has expanded. It has grown over the years. We find that our predominantly black schools are located on the west side of the parish, down along the river in Old Baton Rouge.

The only predominantly one-race white schools we have got are all the way across the parish. In the middle, from north to south, the schools are integrated—desegregated—whichever way you want to call it.

In 1970, the district court declared us to be unitary. When we went to that neighborhood school plan, those schools became desegregated. Some, which were white schools, have become desegregated, and they have now converted to black schools, with black student bodies not faculty.

In 1974, the district court looked at our school system again under a motion from private plaintiffs, and after examining it and calling in outside experts to reexamine the system to see if we were, in fact, unitary, it found that we were. Now, the fifth circuit tells us we are not.

We now are trying to find out what we can do, hopefully to change that court order—that is, busing children across the parish from east to west and west to east, with clusters in that parish.

I have brought some maps. With your permission, I will attempt to give you graphically some idea of what we are talking about and the kind of things that Senator Johnston's bill would limit, not totally prohibit.

This is a map of East Baton Rouge Parish [indicating map] showing the schools. We operate 113 schools. We have about 65,000 children and about 60 percent white, 40 percent black.

These are our school districts [indicating]. You will note that the map says "colors not related." That means, if you see two areas of the same color, it does not mean anything, we have just got more school districts than we have got colors.

Here is the school. The kids in this blue area go to this school [indicating]. It is an odd shape because of capacity. You have to adjust for capacity where your schools are. But these are some of your old schools—small schools—down close to the Mississippi River.

That is the old part of Baton Rouge. It has expanded northeast and southeast and east, all the way out to the other edge of the map.

Up here, you see this big district. That is undeveloped area. But you have got kids living up there. It is a big expanse of territory.

Keep that map in mind a minute. Now, let us show you the other map. This is the court's order that we just got 2 weeks ago [indicating second map].

On this map, the colors are related. Every time you see the same color, the children in those areas are going to the same schools.

For example, the orange up here—those two black dots and these two black dots here—that is a cluster, a noncontiguous cluster. The children in those four separate geographical areas colored orange are going to go to those four schools at the elementary level. That is an elementary school map.

Do you see the yellow? The children living in those areas colored yellow are going to go to those schools. Some of the schools are closed. This order closes 15 of our schools. The only way to do that is to bus them—to bus them in one grade level from here to here [indicating] and the other grade level from here to here [indicating].

You might ask, what is that little yellow piece way out on the end? Again, you have got to fit capacity. Some of those schools out on the east were predominantly white schools. That is where most of our population growth is.

We have put in T buildings because of not having the money or the space to build additional permanent buildings and to handle the students that were there. We have put T buildings up—a normal practice of any school system anywhere in the Nation.

The court order says: "Take away all those T buildings—every one of them." It limits classroom size to 27 pupils.

This school, La Belle Aire, paired to Greenbriar—I am looking at the purple now—is clustered with Forest Heights and Glen Oak Park. The court order says: "Take 200 kids out of La Belle Aire." That yellow—that is the 200 kids that we have got to remove from the La Belle Aire school.

The question was asked: Why take them way out there and bus them all the way over here? Well, if you do not, you bus twice. In this little area [indicating], it is a commercial park, and there are no children.

Here is the La Belle Aire school [indicating]. Do you see the streets all around it? All of these children are within walking distance of that elementary school. They have never been bused. So the only place we have got to move the La Belle Aire children out is out here [indicating], or else we bus these children over here and then bus these children into here [indicating], which does not make sense and doubles your busing. You can see the distances in some of those clusters.

That gives you an idea of what the court orders are doing—the kind of court orders we are now getting—and those are clustering and pairing noncontiguous clustering, noncontiguous pairing.

You can get a racial balance. It does not take "an expert to draw a desegregation plan on the basis on which they are drawing them today. Any junior high school student halfway good in math can sit down with a map, the location of the schools, and where the students live, and their race, and he can draw you a desegregation plan on paper in a matter of hours.

As Judge Dorkins in Shreveport used to say, "An expert is anybody with a briefcase that comes from out of town, and that is about what we face in these cases."

On that map, if Senator Johnston's bill was adopted, I see two clusters composed of eight schools that would be prohibited by his bill because those students would be transported more than 15 minutes and/or more than 5 miles past the school closest to them in zone one—that is at the top—still in zone one.

There is another cluster—20, 30, or 40 schools in those clusters would be prohibited if Senator Johnston's bill were to pass. This problem is not just a problem in the South. Look at Philadelphia, Chicago, New York, and Washington, D.C.

Look at Chicago, for example. I have talked with one of the experts that they have employed to help them. Chicago has 450,000 students approximately. It operates 600-and-some-odd schools with a population of an 80-percent black and 20-percent white student body.

Their experts tell them, going in: "The best you are going to come out with is over 250 all-black schools." Well, if 250 all-black schools are OK simply because of a lack of enough white bodies, then why are not other all-black or all-white schools also OK educationally?

Look at the private school system in Chicago. Chicago's public school system has approximately 450,000 students. The private school system has 350,000 students.

I share the sentiments and the fears of Congressman Moore and Senator Johnston that we are creating in this Nation a two-tiered school system, one private for those well off enough to afford it and a public for the poor, and an underfinanced public system.

I went through the public schools, as I indicated. I would not be here today before you or as a lawyer if it were not for the public school system because my parents back then could not have afforded private schools.

As I said in my statement, and as an anonymous writer once said, "Public education is like the dew from the heavens it falls on rich and poor alike," and we must protect it, and it is being hurt badly.

This chart, which I am going to put into evidence, which I just referred to—I had very hastily had our people in Baton Rouge take Senator Johnston's bill and apply his 15-minute, 5-mile limitation to the court's plan. I would like to file this in the record.[1]

It gives you the number of schools to which children are being bused more than 15 minutes, more than 5 miles past the schools that are closest to them.

By the way, this is only the elementary schools. The court deferred the secondary problem, although at the secondary level the court says that when we implement it next year he is going to take our—we have a K–5 elementary; 6, 7, and 8 middle school; and a 9 through 12 high school—a fairly normal configuration for a school system.

His plan takes our 6, 7, and 8 middle schools or junior highs and turns each one of them into a center—a 6th grade center, a 7th grade center, and an 8th grade center—which means that a child will go to five different schools between the 6th grade and the 12th grade.

I know I have taken a good bit of time, and probably more than I should. Let me mention briefly Rapides. There, the fifth circuit just affirmed Judge Scott in a plan which is designed to racially balance. It creates some centers. It has got bus routes in it of 30 or 40 miles that the children are being bused.

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[1] The chart is kept on file with the committee.

They did ask him to look again at reopening of the Forest Hill School. They have lost, out of some 25,000 students, about 2,000 in the 1 year that that order has been in effect.

They have had to buy 23 additional buses in order to handle the additional busing in their court order. Their buses now travel about 2,700 miles per day more than they did before the order.

In other school systems in Louisiana—some are smaller, rural systems—the busing problem is different in a small, rural system, but the thing that concerns me is our metropolitan areas where the problem is the most serious, and they are getting hurt the worst.

When we tried our Baton Rouge case, the assistant superintendent for the Houston Independent School District testified. He is in charge of their magnet school program. He testified that the kind of pairing plan that we are looking at in Baton Rouge caused them to lose some 10,000 to 15,000 students, and the court ultimately had to come back and unpair the pairs because they wound up busing black kids from a previously all-black school to another all-black school.

He considers pairing, clustering, and busing as obsolete tools of desegregation and that magnet schools and voluntarily help from the community itself by giving them programs that parents of both races will be attracted to is the solution for the future.

As to the danger, I would leave you with just one thought. The best summation of the problem that I know is from the language of Judge Clark of the Fifth Circuit Court of Appeals in the Atlanta case, *Calhoun* v. *Cook* in 1975, when he says—and I quote:

> Since 1958, when this school desegregation suit was filed, the winds of legal effort have driven wave after wave of judicial rhetoric against the patterns of the Atlanta public school system. Today, hindsight highlights the resulting erosion, revealing that every judicial design for achieving racial desegregation in this system has failed. A totally segregated system which contained 115,000 pupils in 1958 has mutated to a substantially segregated system serving only 80,000 students today. A system with a 70-percent white pupil majority when the litigation began has now become a district in which more than 85 percent of the students are black. Out of 148 schools in the city's system——

This was in 1975——

> Atlanta still operates 92 schools with student bodies which are over 90 percent black.

We support Senator Johnston's bill. We respectfully suggest that anything this Congress can do in your findings to tell the courts that the remedies they are applying are not only not achieving what they hope to achieve—they are blocks to them, they are increasing racial prejudice where it probably did not even exist before and creating it where it never existed before, and they are ruining public education systems all over the Nation in doing it.

Thank you, Mr. Chairman. I appreciate the opportunity to speak.

[The prepared statement of Mr. Ward follows:]

Prepared Statement of John F. Ward, Jr.

Chairman East and Members of the Committee: My purpose in testifying before your Committee today, at the invitation of my Senator, the Honorable J. Bennett Johnston of Louisiana, in support of Senate Bill 528 is to make this committee aware of a very real danger to public education in our nation due to recent decisions of our Federal Ccurts.

My perception of this ever increasing danger to public education is based upon my experience as an attorney who has represented many local school systems in Louisiana in desegregation litigation over the past ten to fifteen years. I have not only represented school systems in court room litigation, I have also been involved with Louisiana school systems in the day-by-day effort to successfully implement court ordered desegregation plans which the people in those communities have not accepted.

I am General Counsel for the East Baton Rouge Parish School Board which recently received a new busing Court order. I am also General Counsel for the Louisiana School Boards Association and through that organization I have assisted numerous other school systems with desegregation problems. During the past ten years, I have also served as special counsel with regard to desegregation problems and litigation in many other school systems in my state, including Rapides Parish which also was recently placed under a busing court order.

These Louisiana school systems range in size, with respect to population, from small rural parishes such as DeSoto, Red River, East Feliciana and Pointe Coupee to the larger metropolitan type school systems such as Lafayette, Monroe and East Baton Rouge. In comparison, Rapides Parish is more of a combination of a rural farming area and a metropolitan area. The city of Alexandria, Louisiana, is a part of the parish and a part of its school system.

In addition to assisting professional educators, superintendents of schools, etc. and elected citizen members of school boards, both black and white, in their attempts to solve the very difficult problem of eliminating racial prejudice and racial discrimination in our Nation, I have also consulted with attorneys, school superintendents and school board members from other states and school systems, including Houston, Texas; New Orleans, Louisiana; Montgomery, Alabama; Memphis, Tennessee; and St. Louis, Missouri.

I am presently serving my third term as a member of the Board of Directors of the National Council of School Attorneys, which is an affiliate of the National School Boards Association. In that capacity, I have also discussed busing problems with attorneys from school systems across the nation including states such as Michigan, California, Illinois and several others.

It is with that background of knowledge and experience that I appear before you today in support of Senate Bill 528 by Senators Johnston, Laxalt and others. I support the concept and purpose of Senate Bill 528, because of the danger I perceive to public education in our Nation due to unnecessary Federal Court requirements on public school systems which this Bill would attempt to limit and because of my strong personal belief in public education. I have an absolute conviction that a first-rate, top-flight, public education system is essential to the welfare and survival of this nation and that such a system can best be provided by the states and local governments.

An anonymous writer once said, "public education is like the dew from the heavens, it falls on rich and poor alike." That is why public education must survive, must be nurtured, must be protected, and must be improved. This Bill I believe, will assist in doing that.

I come before you today as a citizen of one of our fifty (50) states who has managed as an attorney to provide reasonably well for his family, and who has seen three of his four children graduate from desegregated public schools in Baton Rouge, Louisiana. I can say to you, members of the committee, that had there not been a public education system in my state when I was going to school, I would probably not be here before you today. I would probably not even be a lawyer. I attended public schools virtually all over my state in the small towns of Winnsboro, La.; West Monroe, La.; and the city of Shreveport, La.; and Baton Rouge, La.; West Monroe, La.; and the city of Shreveport, La.; and Baton Rouge, La.; before attending Louisiana State University and obtaining my Law degree.

I know these little personal facts may appear totally unimportant with regard to this Bill and I recite them for only two purposes. One, to emphasize that the public education systems in America over the past years have provided all of our children with excellent educations. And secondly, and more importantly, that I would not be here today were it not for that public school system. When I was coming up, my parents could not have afforded to send me to private schools. They would have tried. They would have scrimped and scraped and done without almost everything to see that their children were educated. I doubt though, that back then, they could have done it. And they were better off financially than others.

Public education is like the dew from the heavens, it falls on rich and poor alike.

I am here today simply because the federal judiciary has tried to solve the national social problem of racial prejudice and racial discrimination by placing the burden of solving that problem on public education and public school systems through judicial legislation. No one today, or at least very few, would disagree with the Supreme Court's decision in *Brown* v. *Board of Education of Topeka, Kansas,* 347 U.S. 483 which held that the assignment of children and teachers to schools simply because of their race violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. No one today can disagree with the admonition of that decision that we must do what is necessary to bring black children "into the mainstream of American life." But—and although the states and local communities throughout our Nation, may have been slow to "grasp the thistle" and find reasonable ways to accomplish that simple purpose—there is no excuse for the tearing asunder of local communities and local school systems with the chaotic busing requirements placed on public education by the federal judiciary which commenced in the early 1970's.

The most often cited decision in this regard is the Supreme Court's decision in *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971), rendered in April 1971. This decision seems to hold that racial balancing of the student body in every school is not only not required, but actually prohibited, by the Constitution as the court said: ". . . If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

However, other language in that same decision has resulted in private plaintiffs, the Justice Department, and some Courts of Appeal requiring virtually and exactly that. For example, the Court also states in that same decision: "We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement . . . Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court."

The Court then also discussed the existence of, and need to eliminate, so-called "one-race schools" or "racially identifiable schools".

Although the Supreme Court in *Swann* specifically recognized ". . . the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city . . . and that . . . in some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns changed . . .", the Court also indicated that such schools should be regarded with suspicion and again, this language, has been interpreted and expanded by private plaintiffs, the Justice Department, and lower federal courts so as to require the virtual elimination of racially identifiable schools and the requiring of racial balances in virtually all schools. It has not reached the point in the last few years, that so-called "experts" in drawing school desegregation plans for the government and private plaintiffs admit, at the outset, that their purpose is either to achieve a racial balance in each school, or to at least bring the racial balance of each student body within a plus or minus 15 percent of the racial balance in the school sytem as a whole. This is the case with the Federal Government's experts in both Rapides Parish and East Baton Rouge.

This kind of thinking and court orders have already had disastrous results in cities such as Houston, Texas and Dallas, Texas; Atlanta, Georgia; New Orleans, Louisiana; Dayton, Ohio; Columbus, Ohio; Los Angeles, California; Cleveland, Ohio; and many others. Alexandria, Louisiana has presently lost 2,000 children out of approximately 24,000 total students in less than one year of operation under such a court order. Baton Rouge, Louisiana is presently faced with having to implement such a court order next September.

As these are two of the most recent such court orders, I have brought with me today some statistics and maps with regard to these two school systems for submission with my statement which I will now use and attempt to briefly show you some of the problems which hopefully this bill can eliminate.

In explaining these maps and statistics, I might acquaint you briefly with some of the terms which I will be using and which are consistently used by the lawyers, the courts and the so-called desegregation experts. They use such terms as "removing the vestiges of the dual system, rezoning, creating corridors, creating islands, pairing, clustering, and non-contiguous pairing and clustering." Very seldom do they talk about "let's bus these children from here over there". No matter which terms they use, they are basically referring to taking children, both black and white, away from their normal neighborhood and normal neighborhood school and busing those children varying distances to some other school in the school system, and usually over the objections of the parents of those students, and even though some of those children were within walking distance of their original school.

CONCLUSION

Although we noted heretofore that the Supreme Court as a whole has recognized the phenomenon of ethnic residental preference and residential racial isolation as being a problem, particulary in the metropolitian areas of our nation, the Court as a whole has apparently ignored the difficulties and vertual impossibilities which the residential racial isolation causes school systems in desegregating schools. So far, only three Justices, Justice Powell, Justice Rehnquist, and Justice Stewart have indicated grave concern with this problem and have recognized that school systems should not be held responsible for that residential racial isolation.

For example, we find the following comments by Justice Powell in his concurring opinion in *Austin Independent School District* v. *United States,* 429 U.S. 990, 50 L. Ed. 2d 603, 97 S. Ct. 517 (1977) where we find him noting that,

> ". . . The principle cause of racial and ethnic imbalance in urban public schools and across the country—north and south—is the imbalance in residential patterns . . ."

and that

> ". . . Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. . ."

and further that,

> ". . . Economic pressures and voluntary preferences are the primary determinants or residential patterns . . ."

In conclusion, I can think of no better concise summation of the problem than the language of Judge Clark of the Fifth Circuit Court of Appeals in the 1975 decsion of that court in the Atlanta case, *Calhoun* v. *Cook,* 522 F. 2d 717, rehearing and rehearing en banc denied, 525 F. 2d 1203, where he said, with respect to the desegregation process in Atlanta,

> "Since 1958 when this school desegregation suit was filed, the winds of legal effort have driven wave after wave of judicial rhetoric against the patrons of the Atlanta public school system. Today hindsight highlights of the resulting erosion, revealing that every judicial design for achieving racial desegregation in this system has failed. A totally segregated system which contained 115,000 pupils in 1958 has mutated to a substantially segregated system serving only 80,000 students today. A system with a 70 percent white pupil majority when the litigation began has now become a district in which more than 85 percent of the students are black.
>
> "Out of 148 schools in the city system, Atlanta still operates 92 schools with student bodies which are over 90 percent black."

Every metropolitan area of our nation is faced with this type of result to their school systems under such court ordered busing plans. I am hopeful that this Congress, the elected representative of the people, will pass Senate Bill 528 and give the courts some guidance as to the error of the remedies which the Courts have ordered.

Senator EAST. Thank you, Mr. Ward.

Mr. Shattuck?

STATEMENT OF JOHN SHATTUCK, ATTORNEY, LEGISLATIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. SHATTUCK. Thank you, Mr. Chairman. I am grateful for this opportunity to appear before the subcommittee to address an issue of substantial importance to two organizations which I represent.

I am the national legislative director of the American Civil Liberties Union, as you noted. I am also a member of the executive committee of the Leadership Conference on Civil Rights, which is a national coalition of some 150 religious, civil rights, civic, and other organizations committed to promoting equality of opportunity in matters of education, housing, employment, and other fundamental aspects of life.

Appearing with me this morning, as you also noted, is William Taylor, another member of the Leadership Conference executive committee and a national expert on school desegregation issues.

I will speak briefly on the court jurisdiction aspects of the legislation before the subcommittee, and Mr. Taylor will then speak, to the school desegregation issue, which is very closely related.

Both the American Civil Liberties Union and the Leadership Conference on Civil Rights oppose any legislation that would deprive the Federal courts of jurisdiction to issue remedies in cases involving constitutional claims to the extent that the Supreme Court has already held that such remedies are constitutionally required.

In our view, any legislation of this kind, but particularly the legislation before the subcommittee, would be unconstitutional because it would enlist the Federal courts and even the Supreme Court as an active instrument in the violation of constitutional rights, notably in the violation of the right to be free from racial discrimination.

The two bills pending before the subcommittee, S. 528 introduced by Senator Johnston, and S. 1147 introduced by Senator Gorton, both suffer from this fatal defect.

S. 528 would prohibit any court of the United States from issuing any writ ordering directly or indirectly any student to be assigned or transferred to a public school other than that which is nearest to the student's residence unless certain very sharply delineated criteria are met.

Senator Gorton's bill would extend this jurisdictional bar to State as well as Federal courts and would contain no exceptions at all.

In our view, the plain effect of both of these bills would be to prohibit or drastically restrict judicial factfinding and remedial power in cases involving claims of racial discrimination in public school systems.

The subcommittee has heard a good deal this morning about the question of busing—busing, more generically defined by the courts. Pupil assignment and transportation are remedies that the Federal courts order, and have ordered, and are continuing to order to correct clear, unconstitutional racial discrimination in the public schools.

Both of the bills are directed at these remedies, and they differ from other bills concerning Federal court jurisdiction that are pending before the subcommittee in that they purport to limit only the relief that Federal courts can give for certain constitutional violations and not the court's ability to decide whether there was a violation in the first instance.

We do not believe that that distinction is significant because the Supreme Court has ruled that pupil assignment and transportation are sometimes the only remedies that will correct certain violations of the 14th amendment.

For this reason, the frustration or denial of court-ordered remedies for school segregation cannot be distinguished from the frustration or denial of basic rights under the 14th amendment.

The fact is, as you know, Mr. Chairman, in a 1971 decision the Supreme Court struck down a State statute imposing an absolute prohibition on the assignment or transportation of any student on grounds of race to bring about racial balance, a statute very similar to both bills before the subcommittee.

The Court said that this ban "would inescapably operate to obstruct the remedies granted in earlier cases involving the public schools of Charlotte-Mecklenburg," and noted that because "bus transportation has long been an integral part of all public educational systems, it is unlikely that a truly effective remedy could be devised without continued reliance on it."

Mr. Chairman, if a State antibusing statute violates the 14th amendment, as the Supreme Court says, when it operates to hinder vindication of Federal constitutional guarantees, it is difficult to conclude that a congressional statute achieving the same result possibly could be found constitutional.

The net effects of the two bills before you would be to ban any Federal court, including the Supreme Court, and any State court, in the case of Senator Gorton's bill, from issuing any remedy which the Supreme Court has held constitutionally required when no other remedy is adequate to correct the constitutional violation which the Court has found after there has been a full and substantial litigation of that issue before the Court.

If adopted, this approach to court jurisdiction in this area and many others would begin to undermine our entire system of judicial protection of constitutional rights.

We agree on this essential point, which we think is the core of the court jurisdiction issue, with the testimony that you heard yesterday, before the Constitution Subcommittee, from Prof. William Van Alstyne of Duke University Law School.

He said:

> Congress does, of course, have great latitude and respect for the furnishing of legal remedies, but in no case may it so reduce remedies to such an extent that, in the Court's own view, its inability to furnish such remedies is essentially not different than to make the prevailing party the losing party instead. In brief, minimal remedies imperative to the very substance of a constitutional right may not be forbidden under the claim of the exceptions or regulations clause of the Constitution.

Our position on the general question of congressional power to regulate Federal court jurisdiction is set forth extensively in testimony delivered on behalf of the American Civil Liberties Union by Prof. Telford Taylor before the Constitution Subcommittee on May 20. I would ask, with your permission, Mr. Chairman, that that be included within the record of these proceedings.

Senator EAST. Without objection, it will be included in the record at this point.

[The prepared statement and letters of Professor Taylor, submitted by Mr. Shattuck, follow:]

STATEMENT OF TELFORD TAYLOR
ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

before the

SUBCOMMITTEE ON THE CONSTITUTION
JUDICIARY COMMITTEE

My name is Telford Taylor. I am a lawyer, admitted to practice in the District of Columbia, New York State, and various federal courts including the Supreme Court of the United States. I have been at the bar for 47 years, first as a federal government attorney (1933-42), and since 1952 as a private practioner. In recent years I have been principally occupied with law school instruction, and have conducted classes and seminars at the Yale, Columbia, Harvard, University of Colorado, and Benjamin Cardozo Law Schools. I am presently Nash Professor Emeritus at the Columbia Law School and Kaiser Professor of Constitutional Law at the Cardozo Law School.

Throughout these years I have been primarily concerned with federal, including federal constitutional, law, and I have conducted classes in constitutional law at all of the above-named institutions, and in every year since 1963.

I am appearing here on behalf of the American Civil Liberties Union, in order to discuss the extent of congressional power over federal court jurisdiction. I am aware that there are a number of pending bills which withdraw court jurisdiction in a variety of ways. But I believe it would be most helpful if I focus my testimony on one of the most narrowly drawn bills, since what I have to say about it will apply *a fortiori* to bills which will withdraw even more jurisdiction. So I will direct my remarks to S. 158, introduced by Senator Helms, which undertakes to withdraw from the lower federal courts jurisdiction to issue injunctions and declaratory judgments in cases involving state laws which prohibit or limit the performance of abortions. I share with the

ACLU the view that this provision, if enacted into law, would be unconstitutional. But I am not a member of or bound by the views of the ACLU, and the particular contents of this statement do not necessarily reflect their opinions.

1. Congress and the Inferior Federal Courts

My opposition to the jurisdictional provisions of S.158 is not based upon a narrow view of Congressional power in this field. The Supreme Court has explicitly recognized that Congress has "plenary control over the jurisdiction of the federal courts." Bro. of R. Trainmen v. Toledo, P. & W. R. Co., 321 U.S. 50, 63-64 (1944). This is in accord with the history and language of Article III of the Constitution, Section 1 of which vests the judicial power in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." It is generally understood that this wording embodied a compromise between those among the framers who favored and those who opposed establishment of a federal court system. Thus the decision between the two alternatives was not mandated by the Constitution itself, and it was left up to Congress to handle by statute.

It thus appears that it would have been entirely constitutional for Congress to establish no "inferior" federal courts at all. And although the First Congress did in fact establish the district and circuit courts, the First Judiciary Act gave them a range of jurisdiction which, by today's standards, was very narrow.

Accordingly, if we were to look to the intentions of the framers, Congress could constitutionally conclude and legislate extensive curtailment, or even abolition, of inferior federal court jurisdiction. Of course, from a practical standpoint, a decision not to make inferior federal courts in 1791 would have been quite different from a decision to abolish them in 1981, after we have had federal courts for nearly two centuries, and after more than a century during which they have become a major part of the nation's judicial machinery. These practical considerations have led one commentator to conclude that: "Abolition of the lower federal courts is no longer constitutionally permissible . . . . the jurisdiction of these courts is not a matter solely within the discretion of Congress." Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974).

While I think all would agree that today the abolition of the lower federal courts, or deep inroads into their jurisdiction, would be extremely unwise, and indeed destructively revolutionary, of course S.158 is, quantitatively, a very limited withdrawal. My opposition to it, and my conclusion that it is unconstitutional, does not rest upon the proposition that there are quantitative constitutional limits on Congressional power over inferior federal court jurisdiction. That power is, as stated by the Supreme Court, "plenary," like, for example, Congressional power to regulate interstate commerce.

2. Constitutional Limitations on Congressional Power

But to say that Congressional power over lower federal court jurisdiction is "plenary" does not mean that it is immune from the general limitations on Congressional power found elsewhere in the Constitution, including the several amendments. Congress specifies the jurisdiction by enacting statutes, and those statutes are no more immune from constitutional scrutiny than any others.

The Congressional power over interstate commerce is so ample that, despite the enormous proliferation of federal legislation, not since 1936 has a federal regulation of commerce been held unconstitutional. Yet nothing is better settled than that this power is subject to constitutional limitations such as the First Amendment and the due process clause of the Fifth Amendment. Were Congress to enact statutes forbidding interstate carriers to transport literature reflecting a particular political persuasion, or goods owned by members of a particular race or adherents of a religion, these statutes would undeniably be regulations of interstate commerce, but they would be constitutionally invalid under the First or Fifth Amendments.

The same principle applies to the exercise of Congressional power under Article III. A statute withdrawing from the federal courts jurisdiction to issue injunctions at the suit of individuals identified with particular political, racial, or religious groups would be manifestly unconstitutional under those same amendments.

These conclusions, I believe, follow inevitably from the language and structure of the Constitution. See Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935): "The bankruptcy power, like the other great substantive powers, is subject to the Fifth Amendment." That there are few precedents in the jurisdictional field is, therefore, hardly surprising. But sufficient precedent is not lacking, for the foregoing conclusions are amply and explicitly supported by the decision and opinion in United States v. Klein, 13 Wall. 128 (1872). In that case, the Court of Claims had been given jurisdiction to determine, subject to Supreme Court review, claims to recover property taken by military action during the War Between the States. Some such claimants had been adherents of the Confederacy, but had subsequently taken amnesty oaths pursuant to President Lincoln's pardon proclamation.

With the purpose of barring such claimants from recovery, Congress in 1870 passed a statute which provided that, if in any such case the claimant relied upon a presidential pardon as proof of eligibility, the Court of Claims or the Supreme Court (as the case might be) should have no further jurisdiction, and should dismiss the claim for want of jurisdiction.

In the Klein case, involving such a claim, the Supreme Court held the 1870 statute unconstitutional, saying that it was not "an exercise of the acknowledged power of Congress" over the Supreme Court's appellate jurisdiction. Two reasons were given of which one, directly relevant here, was that the statute impaired the effect of a pardon, and thus infringed the President's constitutional power under Article II, Section 2 to "grant Reprieves and Pardons for Offenses against the United States." The fact that the 1870 statute was phrased in jurisdictional terms made no difference, since its effect was beyond the power of Congress and violated Section 2 of Article II.

Accordingly, the requirement that statutes enacted by Congress under its Article III powers conform to general constitutional limitations is clearly established, both under the language and structure of the Constitution, and as a matter of decisional precedent. The immediate question is whether Section 2 of S.158 can survive constitutional scrutiny under those principles. For the reasons given hereinafter, I believe that question must be answered in the negative.

3. The Purpose of Section 2 of S.158 is constitutionally Impermissible

Section 2 of S.158, like the statute of 1870 involved in the Klein case, is a limitation on federal court jurisdiction. But just as the purpose and effect of the 1870 statute was substantive -- i.e., to nullify the effect of a presidential pardon on war property claims -- so the purpose and effect of Section 2 of S.158 is substantive -- i.e., to make it more difficult than theretofore for individuals to secure their constitutional rights recognized in Roe v. Wade. In neither case is the purpose constitutionally permissible.

Now, of course, I am aware of the many cases in which the Supreme Court has declared and applied the rule that the constitutionality of a statute must be determined on its face, and without inquiry into motives or purposes that underlie the enactment. See, e.g., McCray v. United States, 195 U.S. 27, 56 (1904); Arizona v. California, 283 U.S. 423, 455 (1931); United States v. Darby, 312 U.S. 100, 113-14 (1941); Flemming v. Nestor, 363 U.S. 603, 617 (1960); United States v. O'Brien, 391 U.S. 362, 382-86 (1968). For example, a law prohibiting anyone other than a lawyer from engaging in debt-adjusting will be upheld if a rational and legitimate purpose can be conceived, without going behind the face of the statute to determine whether or not the actual legislative motive was to confer financial benefits on lawyers -- a motive by which legislators, many of whom are lawyers, might be governed. Ferguson v. Skrupa, 372 U.S. 726 (1963).

But there are well-recognized exceptions to that principle. United States v. O'Brien, supra at 383 note 30; Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970). Perhaps the most important one involves the equal protection clause of the Fourteenth Amendment. For many years the Supreme Court has declared the rule that the unequal impact of a statute is not enough to establish a violation of the equal protection clause; there must be a governmental purpose to discriminate. Snowden v. Hughes, 321 U.S. 1 (1944); Keyes v. School District, 413 U.S. 189 (1973); Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977); Mobile v. Bolden, 446 U.S. 55 (1980). And it is equally well settled that, in equal protection cases, the courts are not limited to an examination of the statute on its face. Loving v. Virginia, 388 U.S. 1 (1967); Green v. County School Board, 398 U.S. 430 (1968); Columbus Board of Education v. Penick, 443 U.S. 229 (1979). Indeed, the inequality of impact may be so great that a purpose to discriminate may be inferred from that circumstance alone. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Washington v. Davis, supra at 253-54 (Justice Stevens, concurring).

Finally, and perhaps most important for present purposes, the Court has held that a statute which does not on its face articulate an unlawful purpose, may, because of its language and the context in which it is enacted, disclose on its face an unlawful purpose and an inevitable unlawful effect. Grosjean v. American Press Co., 297 U.S. 233 (1936); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

The Gomillion case involved an Alabama statute enacted in 1957 which changed the boundaries of the City of Tuskegee from a square to what the Supreme Court described as "a strangely irregular twenty-eight-sided figure" (364 U.S. at 341). The complainants, black citizens resident within the square boundaries, sought in the federal courts a declaratory judgment that the statute was unconstitutional, alleging that its "essential inevitable effect" would be "to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident."

The lower federal courts dismissed the action on the ground that they had no power to review the Alabama legislature's action. The Supreme Court unanimously reversed the judgment below, holding that, upon the facts alleged, the statute violated the Fifteenth Amendment, since upon those facts ". . . the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segragating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."

I believe that the relevance of the Gomillion case to the issue at hand here is obvious. The power of the Alabama legislature over municipal districting was recognized by the Supreme Court as having "breadth and importance" (364 U.S. at 342), just as Congressional power under Section 1 of Article III should be so recognized. The Alabama statute did not explicitly disfavor black residents of Tuskegee, but the boundaries drawn made clear its unconstitutional purpose and effect. Section 2 of S.158 does not explicitly avow an unconstitutional purpose, but such a purpose is nonetheless manifest, from both its text and its context.

To be sure, the constitutional rights involved are not the same. The Gomillion case involved the voting rights protected by the Fifteenth Amendment or, as Justice Whittaker thought (356 U.S. at 349), the equal protection clause of the Fourteenth Amendment. That clause is not irrelevant to the scrutiny of S.158, but the constitutional rights recognized in Roe v. Wade are, under the Court's opinion, based on the concept of personal liberty embodied in the due process clause. These rights the Court declared to be "fundamental," and "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (410 U.S. at 153). Certainly they are constitutionally entitled to as much protection as those involved in the Gomillion and Grosjean cases.

Plainly S.158, including Section 2, is intended to prevent if possible, and at least to obstruct, fulfillment of the rights recognized in Roe v. Wade. Indeed, the sponsors of this and similar bills have been commendably frank in acknowledging that purpose, and have no effort to mask it. I am taking the liberty of attaching to my statement the letter to me from the ranking minority member of this Subcommittee, requesting my views on the constitutionality of Section 1 of S.158, together with my reply. The Senator's letter states that the purpose of S.158 "is to overturn the effect of the Supreme Court decision in Roe v. Wade." That, of course, is not a jurisdictional but a substantive purpose, and indicates that Section 2 is not, despite its form, intended as a jurisdictional enactment.

But it is quite unnecessary to rely on such statements by the bill's sponsors, and my conclusion that Section 2 is unconstitutional is based squarely on the text of the bill itself. For it is impossible to conceive of any jurisdictional considerations to which the bill is relevant. There are, to be sure, a number of litigations involving the performance of abortions pending in the federal courts, but they constitute but an infinitesmal part of the total volume of federal court litigation. Thus the bill cannot reasonably be regarded as intended to reduce the burdens on the federal courts.

Cases involving the federal constitutionality of state laws are, to be sure, very numerous in both state and federal courts. A view could be advanced that since state laws are involved, their validity should be first passed upon in the state courts. Of course, that would throw on the Supreme Court the entire burden of ensuring uniformity among the states of the standards of constitutional validity, and I do not think such a course would commend itself as a matter of policy. But recognizing that such a decision is within the ambit of Congressional power, S.158 accomplishes this only with respect to injunction and declaratory judgment actions involving the particular rights recognized in Roe v. Wade. It cannot reasonably be contended that so singular a change is reasonably related to a general jurisdictional purpose. Nor do abortion litigations present any features that explain singling them out from other rights similarly derived from the Fifth or Fourteenth Amendments, for exclusion from the federal courts.

The conclusion is inescapable, on the face of the bill, that its only purpose and its inevitable effect are to obstruct the judicial protection of the constitutional rights recognized in Roe v. Wade. Such purpose and effect, in the absence of a compelling state interest, are unconstitutional: "It is well settled that, quite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right secured by the Constitution [it] is presumptively unconstitutional.'" Harris v. McRae, 480 U.S. -- , 65 L.Ed. 2d 784, 801 (1980); Mobile v. Bolden, 446 U.S. 55, 76 (1980); San Antonio School District v. Rodriguez, 411 U.S. 1, 17, 31 (1973); Shapiro v. Thompson 394 U.S. 618, 634 (1969).

I should add, though it may be unnecessary, that Section 2 of S.158 also violates the principle of equal protection of the laws, which has been held to be embodied in the due process clause of the Fifth Amendment, and is therefore binding on the federal government as well as the states. Bolling v. Sharpe, 347 U.S. 492 (1954). For the jurisdictional withdrawal in Section 2 singles out pregnant women, whose rights are protected by Roe v. Wade, as a group subjected to a denial of access to the federal courts. There is no conceivable state interest which warrants subjecting them to this deprivation of access to the federal courts equal to that enjoyed by those seeking to protect comparable constitutional rights.

4. There is no valid precedent for the jurisdictional withdrawal attempted in Section 2 of S.158

There remains to be considered the question whether there are precedents, legislative or judicial, which might be effectively invoked to justify the jurisdictional withdrawal attempted by Section 2 of S.158. Its acknowledged purpose is not novel. The Supreme Court must, in the nature of things, deal with issues which arouse strong political, social, and religious feelings. Some of its decisions are bound to antagonize individuals and even large groups of people who believe with deep sincerity that what the Court has done is very wrong, but who also realize that the prospect of undoing its work by the method prescribed in the Constitution -- i.e., by amendment pursuant to Article V -- is remote. The device of accomplishing a nullification, complete or partial, of a Court decision by withdrawing from the courts jurisdiction to enforce it, has been used in many bills introduced in Congress on many previous occasions.

Constitutional scholars tell us that between 1953 and 1968 over sixty bills were introduced in Congress to eliminate the jurisdiction of the federal courts over a variety of particular subjects. Hart and Wechsler, The Federal Courts and the Federal System (2nd edit. 1973) 360. That is not surprising, since those years witnessed a number of Supreme Court decisions which were sharply denounced, both within and without Congress. What is perhaps surprising, in view of the heat generated, is that not one of those bills was enacted into law. Congress as a whole has exhibited a most commendable restraint in this regard, realizing no doubt that this is a dangerous game which can be played at both ends of the spectrum, and that if such devices begin to take hold as statutes, the ultimate result will not be to ensure the dominance of a particular point of view, but to alter radically the long-established relation and balance among the legislative, executive, and judicial departments.

In consequence of this enduring Congressional restraint, the statutory and judicial examples which are somewhat comparable to S.158 are very few, and there are only three which I think warrant comment.

The Norris-LaGuardia Act (1932). I deal with this statute (now

29 U.S.C. Secs. 101-115) first, not only because it is the earliest chronologically, but also because some of the language of Section 2 of S.158 appears to be derived from it.

The Norris-LaGuardia Act arose out of the belief, shared by leaders of both the Republican and Democratic parties, that there had been abuses in the issuance of injunctions in labor disputes. S. Rep. No. 163, H.R. Rep. No. 669, 72d Cong., 1st Sess.; Frankfurter and Greene, The Labor Injunction (1930) passim. Section 1 of the Act provides:

> No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary injunction be issued contrary to the public policy declared in this chapter.

It will be noted that, unlike Section 2 of S.158, the Norris-LaGuardia Act does not wholly withdraw the jurisdiction to issue the specified injunctions. Section 2 declares a public policy of freedom for workers to associate and organize for collective bargaining and other labor ends; Sections 4 and 5 specify certain conduct which is excluded from injunctive jurisdiction; Sections 7 and 9 specify certain findings which the courts must make and procedures they must follow before issuing injunctions.

None of these provisions involved infringement of constitutional rights, and Congress' power to regulate and limit the remedies (including injunctions) available to litigants in the lower federal courts (in the absence of such infringements) had never been seriously questioned. When a case arose wherein a lower federal court had issued an injunction on the basis that the case did not involve a "labor dispute" as defined in the Act, the Supreme Court, in reversing that decision, gave general approval to the Act's jurisdictional limitations: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938).

But the Lauf case did not concern other provisions of the Norris-LaGuardia Act which (Section 3) declare "yellow dog contracts" (i.e. employment agreements conditioned on the employee's undertaking not to join a union) to be "contrary to the public policy of the United States" and "not . . .

enforceable in any court of the United States," and (Section 4(b)) withdraw from the federal courts jurisdiction to enforce such contracts. Many years earlier the Supreme Court had invalidated, as violations of due process, both federal and state statutes outlawing "yellow dog" contracts. Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915). Thereafter the Supreme Court also held state legislation, limiting employers' rights to state court injunctions against striking employees, to be invalid under the due process and equal protection clauses. Truax v. Corrigan, 257 U.S. 312 (1921).

None of these decisions had been formally overruled at the time the Norris-LaGuardia Act was adopted, and it was certainly arguable that Sections 3 and 4(b) were unconstitutional, insofar as they rendered "yellow dog" contracts unenforceable in, and outside the jurisdiction of, the federal courts. In all probability it was such doubts that led Congress to provide for the withdrawal of injunctive jurisdiction, guided by a memorandum from (then) Professor Felix Frankfurter stressing the scope of Congressional power over federal court jurisdiction (H. Rep. No. 669, supra pp. 12-16); see also Frankfurter and Greene, supra pp. 210-20.

The constitutional validity of Sections 3 and 4(b) of the Norris-LaGuardia Act was never judicially tested, no doubt because the Act's importance was greatly diminished by passage of the National Labor Relations Act in 1936. The Adair and Coppage cases were not explicitly over-ruled until 1941. Phelps Dodge Corporation v. Labor Board, 313 U.S. 177, 187 (1941). But they were in poor constitutional health as early as 1930, when the Court unanimously upheld the Railway Labor Act of 1926, in an opinion by Chief Justice Hughes (who had dissented in the Coppage case) which distinguished the Adair and Coppage cases in casual and unconvincing fashion. Texas & N.O.R. Co. v. Ry. Clerks, 281 U.S. 548, 570 (1930). And of course, if those cases were no longer governing in 1932, the constitutional rights they declared had likewise withered, and the jurisdictional withdrawal in Section 4(b) of the Norris-La Guardia Act impaired no such rights.

For all these reasons, I do not believe that the Norris-La Guardia example offers any substantial support to the constitutionality of Section 2 of S.158.

The Emergency Price Control Act of 1942. This statute, enacted under the pressures of wartime, contained provisions narrowly channeling federal court jurisdiction to review orders and regulations of the Price Administrator, in order to secure rapid and uniform enforcement of wartime price controls. An "Emergency Court of Appeals," composed of three federal district or circuit judges, was established to hear and determine such cases, subject to review by certiorari in the Supreme Court. All other courts, both federal and state, were denied jurisdiction to pass on the validity of the Administrator's acts, with certain specified exceptions.

Whether the prohibitions running to the state courts were ever judicially reviewed, I do not know; state court obligation to entertain damage suits for violation of price ceilings was confirmed in Testa v. Katt, 330 U.S. 386 (1947). The withdrawals of jurisdiction from the federal district and circuit courts were sustained. Lockerty v. Phillips, 319 U.S. 182 (1943); Yakus v. United States, 321 U.S. 414 (1944).

The statutory feature most susceptible to constitutional challenge was the denial of the Emergency Court of any power to grant interim relief, by temporary restraining order or injunction. This provision was upheld in the Yakus case not as a general proposition but only "in the circumstances of this case," meaning the war emergency (321 U.S. at 437, 439): "If the alternatives, as Congress concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation."

There is no such emergent and compelling public interest to be invoked in support of the denial of federal injunctive relief in abortion litigation. Abortion cases, on the contrary, are of a nature that especially requires the availability of interim protection; the pregnant woman can hardly be required to comply with an anti-abortion statute while its constitutional validity is being determined.

The price control statutes and decisions, born as they were of the urgent necessities of wartime, thus offer no support to the jurisdictional withdrawal attempted by S.158.

The Portal-to-Portal Act of 1947. In decisions rendered between 1944 and 1946, the Supreme Court construed the "work week" clause of the Fair

Labor Standards Act of 1938 as including underground travel time in mines. Time so spent had not theretofore been generally treated as compensable, and these decisions precipitated a flood of litigation embracing claims for back pay totalling over 5 billion dollars, including claims against the United States totalling over 1-1/2 billion dollars. Congress then enacted the Portal-to-Portal Act of 1947 (29 U.S.C. 251-62), in which Congress found that such unexpected retroactive liabilities threatened financial ruin to many employers and serious consequences to the federal Treasury. To avoid these hazards, the Act not only wiped out the liabilities, but also withdrew jurisdiction to adjudicate such claims from all federal and state courts without exception.

In the numerous litigations which ensued, it was contended that Congressional nullification of these claims destroyed vested rights in violation of the Fifth Amendment. The courts uniformly rejected this contention, but most of them took jurisdiction and decided the cases on the substantive merits, despite the attempted withdrawal of jurisdiction. Thus a distinguished panel of judges in the Court of Appeals for the Second Circuit wrote in Battaglia v. General Motors Corp., 169 F.2d 254, 257 (C.C.A.2d, 1948):

> A few of the district court decisions sustaining . . . the Portal-to-Portal Act have done so on the ground that since jurisdiction of federal courts other than the Supreme Court is conferred by Congress, it may at the will of Congress be taken away in whole or in part. . . . We think however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law, or to take private property without just compensation [citing cases]. . . .

That decision and the passage quoted squarely support the position I am taking here today. Just as in the Portal-to-Portal Act, Section 2 has been included in S.158 for the sole purpose of blocking judicial review of Section 1 thereof. And since Section 1 seeks to achieve ends which are unconstitutional under the Fifth Amendment, as was established in Roe v. Wade, Section 2 is itself in violation of the Fifth Amendment.

I should deal with one further matter. The Portal-to-Portal Act sought to close off access to all courts, state and federal alike, while both the Norris-LaGuardia Act and Section 2 of S.158 leave access to the state courts untouched. Although the Battaglia court did not rest its decision on that circumstance, it is the view of some constitutional scholars that this difference is crucial, and that would-be litigants barred by Congress from access to the federal courts have no basis for complaint if the state courts remain open to them.

It is hard for me to take this argument seriously. The fact that a statutory withdrawal of jurisdiction is limited to the federal courts certainly does not immunize that statute from constitutional scrutiny. It cannot be seriously contended that a statute limiting federal court access to white litigants could be sustained on the ground that the suits of black litigants could be determined in the state courts.

This does not mean that continued access to the state courts may not in some circumstances be a relevant constitutional factor. If a substantial state interest is asserted as the basis for denying federal jurisdiction, and that interest must be weighed against the disadvantage to litigants, the fact that the state courts remain available may well tip the scales in favor of the withdrawal. In all three of the instances of withdrawal discussed above, such interests were credibly asserted. But no such interests are or can be credibly invoked in support of Section 2 of S.158, which shows on its face that its only purpose is to chill and obstruct the vindication of constitutional rights.

In theory, if not in practice, Congress has power to repeal the 1875 legislation which gave the federal courts general jurisdiction in cases arising under the Constitution and laws of the United States. But having conferred such general jurisdiction, Congress must have a constitutional basis for making exceptions to it, and the fact that the state courts may be available is but one factor for consideration. With regard to Section 2 of S.158, I believe it is of no weight, since no valid purpose of the withdrawal is invoked.

Conclusion

For all the reasons given, it is my opinion that Section 2 of S. 158, or any comparable bills that would selectively withdraw federal court jurisdiction over particular constitutional claims, if enacted, would be unconstitutional. I thank the Subcommittee for affording me this opportunity to present my views.

United States Senate
WASHINGTON, D.C. 20510

April 29, 1981

Professor Telford Taylor
Department of Law
Columbia University
Broadway & West 116th St.
New York, New York 10027

Dear Professor Taylor:

I am currently serving as the ranking minority member of the United States Senate Judiciary Committee Subcommittee on Separation of Powers. On April 23 and 24, the Subcommittee is beginning a series of hearings on S.158. This legislation is designed to define human personhood as beginning at conception. The purpose of the legislation is to overturn the effect of the Supreme Court decision in Roe v. Wade. I am enclosing a copy of the bill for your review.

I am writing to you in your capacity as a leading expert on American constitutional law. I am interested in your assessment of whether or not the Congress has the authority under the Constitution and particularly under Section 5 of the 14th Amendment to enact Section 1 of S.158. Does the Congress have the authority to define legal/constitutional personhood in the face of the Supreme Court decisions on abortion? For legal analysis by the sponsor of the bill, see Volume 127 Con. Rec. S.288-S.294 (Daily Ed. January 19, 1981).

The Subcommittee will be considering these matters in the near future and so a timely response would be most helpful.

I appreciate your assistance in this matter and look forward to hearing from you as soon as possible.

With best personal regards, I am

Sincerely,

Max Baucus

Enclosure

May 7, 1981

Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This will acknowledge your letter of April 29, 1981, requesting my opinion on the constitutionality of bills such as S. 158 and H.R. 900, which undertake to define "person" as used in the Fourteenth Amendment to the Constitution as including the human fetus from the moment of conception. It is understood that the purpose of these bills is to override the Supreme Court's rulings in Roe v. Wade, 410 U.S. 113 (1973) and subsequent decisions based on the principles of that case. Since those decisions are based on the Constitution itself, it appears that the purpose of these bills is to bring about a change in the scope and effect of the relevant Constitutional provisions by statutory means, rather than by amendment of the Constitution in accordance with the procedures prescribed in Article V.

The bills in question rely explicitly on the power of Congress under Section 5 of the Fourteenth Amendment as the constitutional basis of their provisions. The scope of this power, during the last fifteen years, has been the subject of at least four significant Supreme Court decisions. South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); Rome v. United States, 446 U.S. 156 (1980); see also Fullilove v. Klutznick, 448 U.S. ___ (1980). In all these cases except the first, the Court was divided in opinion on the governing principles, and professional comment on the problem has reflected its controversial nature.

Despite this division of opinion, I believe it to be clear that the bills in question are unconstitutional. The majority opinion in the Morgan case goes further than any other in giving scope to Congressional power under Section 5 of the Fourteenth Amendment, but in that opinion it was categorically stated that Section 5 gives Congress no power "to restrict, abrogate, or dilute" constitutional guarantees. Katzenbach v. Morgan, 384 U.S. at 651 n.10. There can be no doubt that the purpose and purport of the bills in question is to "restrict, abrogate, or dilute" the constitutional rights of pregnant women as established in Roe v. Wade.

As for the members of the Court who do not share the expansive views of Congressional power under Section 5 articulated by the majority in the Morgan case, it is my belief that, regardless of their agreement or disagreement with Roe v. Wade, they would conclude that the constitutional principles it established cannot be nullified by statutory action.

For the foregoing reasons, stated above in summary form, it is my opinion that the bills you have called to my attention are unconstitutional.

Sincerely yours,

Telford Taylor
Nash Professor of Law, Emer.

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SUMMARY

Mr. SHATTUCK. I would like to very briefly summarize Professor Taylor's position and our position before turning to my colleague for a more extended treatment of the constitutional importance of the remedy which S. 528 and S. 1147 would abolish.

In our view, the fact that Congress has the power under article 3 of the Constitution to regulate the jurisdiction of the Supreme Court and to establish the lower Federal courts does not mean and cannot mean that it can dictate to the courts what constitutional cases to decide and how to go about deciding them.

The power that Congress has over court jurisdiction is, like all other congressional powers, subject to the general limitations on congressional powers that the rest of the Constitution imposes, particularly the Bill of Rights.

This is certainly true with other congressional powers. The courts have long held that the power to regulate interstate commerce is subject to qualifications and limitations imposed on it elsewhere in the Constitution and the Bill of Rights, and it is no less true with respect to Congress power under article 3 to regulate court jurisdiction.

•What this means in practical terms is that, among other things forbidden by the Constitution, Congress cannot make it more difficult for racial minorities to obtain protection of their rights by effectively blocking the courts from granting them a remedy against illegal discrimination.

But this is precisely what these bills would do, and it is clear on the face of the bills that that is what they are intended to do. In fact, it is impossible to conceive that they have any other purpose. They are clearly not aimed at reducing burdens on the Federal courts since school desegregation cases are an infinitesimal part of the total volume of Federal court or State court litigation.

Another major flaw of these bills is that they would violate the principle of equal protection of the laws by singling out a particular class of cases involving claims of illegal discrimination against racial minorities.

These bills, in our view, are no more acceptable than a proposal to shut the courthouse doors to blacks, or Catholics, or women, or any other minority within our system of government.

There is no conceivable State interest that could ever justify the kind of discrimination against a particular racial class of litigants that would result if these bills were enacted into law.

Finally, Mr. Chairman, and perhaps most importantly, it is worth noting that many constitutional decisions of the Supreme Court are unpopular and have drawn fire over the years.

Because this has always been true, it is not surprising that over the years many bills have been introduced in Congress to limit court jurisdiction and to issue particular remedies which the Supreme Court has found are essential in order to remedy constitutional violations.

But it is significant, I think, that not a single one of these bills has ever been enacted. I think Senator Johnston made that point himself.

Ever since the notorious Roosevelt court packing plan of 1937, the Congress has been generally restrained in its attitudes and actions toward the courts, having learned what the executive branch could try to do to the courts, and it has recognized the need to keep the courts independent from the political branches of Government.

This restraint is both politically and constitutionally astute. It is astute because the court jurisdiction game can be played by both ends of the political spectrum.

If bills like S. 1147 and S. 528 begin to take hold as statutes, the ultimate effect will not be to insure the dominance of a particular point of view about what the Constitition does or does not require but to radically alter the long-established balance among the legislative, executive, and judicial departments and to turn the Constitution into a political football.

I would strongly doubt that this is what Senators Johnston and Gorton had in mind when they introduced their bills, and I would hope that this is what will finally persuade this subcommittee and this Congress not to endorse them.

Thank you, and I think Mr. Taylor will add to what I have to say about the subject.

[The prepared statement of Mr. Shattuck follows:]

STATEMENT OF JOHN SHATTUCK
ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION,
ACCOMPANIED BY WILLIAM L. TAYLOR,
ON BEHALF OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

I am grateful for this opportunity to testify on a subject of substantial importance to the American Civil Liberties Union, on whose behalf I appear. The ACLU is a nationwide, nonpartisan organization of more than 200,000 members dedicated to protecting the Bill of Rights. I am also a member of the Executive Committee of the Leadership Conference on Civil Rights, a national coalition of 151 religious, labor, civil rights and civic organizations committed to promoting equality of opportunity in matters of education, housing, employment, and other fundamental aspects of life. I am an attorney, a graduate of the Yale Law School, and am admitted to practice in the State of New York, in various federal courts and in the United States Supreme Court.

The American Civil Liberties Union and the Leadership Conference on Civil Rights oppose legislation to deprive the federal courts of jurisdiction to issue certain remedies in cases involving constitutional claims, to the extent that the Supreme Court has held such remedies to be constitutionally required. In our view, any such legislation would be unconstitutional because it would enlist the courts as an active instrument in the violation of constitutional rights.

The two bills pending before the Subcommittee which are the subject of this hear, S. 528, introduced by Senator Johnson and S. 1147, introduced by Senator Gorton, both suffer from this fatal defect. S. 528 would prohibit any "court of the United States" from issuing "any writ ordering, directly or indirectly any student to be assigned or transferred to a public school other than that which is nearest to the student's residence" unless certain sharply delineated criteria are met. S. 1147 would extend this jurisdictional bar to state as well as federal courts, without any exceptions. In our view, the plain effect of both bills would be to prohibit or drastically restrict judicial factfinding and remedial power in cases involving claims of racial discrimination in public school systems.

Pupil assignment and transportation are remedies that federal courts order to correct past unconstitutional discrimination in schools. S. 528 and S. 1147 are directed at these remedies. They differ from other bills proposing to withdraw federal court jurisdiction over selected constitutional cases in that they purport to limit only the relief that federal courts can give for certain constitutional violations--and not the courts' ability to decide whether there was such a violation.

But the Supreme Court has ruled that, as a practical matter, pupil assignment and transportation are sometimes the only remedies that will correct certain violations of the Fourteenth Amendment. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971). Thus, frustration or denial of court-ordered remedies for school desegregation cannot be distinguished from frustration or denial of the underlying Fourteenth Amendment right. See Cooper v. Aaron, 357 U.S. 1, 17 (1958); Griffin v. School Board of Prince Edward County, 377 U.S. 218, 232 (1964).

Indeed, in North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971), the Supreme Court struck down a state statute imposing "an absolute prohibition" on the assignment or transportation of any student on grounds of race to bring about racial balance. The Court said that this ban "would inescapably operate to obstruct the remedies granted" in the Charlotte-Mecklenburg case, and noted that because "bus transportation has long been an integral part of all public educational systems, . . . it is unlikely that a truly effective remedy could be devised without continued reliance upon it." (402 U.S. at 46.) If a state anti-busing statute violates the Fourteenth Amendment "when it operates to hinder vindication of federal constitutional guarantees," it is difficult to conclude that a congressional statute achieving the same result could possibly be constitutional.

The net effect of S. 528 and S. 1147 would be to ban any federal court, including the Supreme Court (and any state court, in the case of S. 1147), from issuing a remedy which the Supreme Court has held is constitutionally required when no other remedy is adequate to correct a constitutional violation which the Court has found, after full adjudication of the merits of the underlying constitutional claim. If adopted, this approach to court jurisdiction would begin to undermine our entire system of judicial protection of constitutional rights. We agree on this essential point with the testimony of Professor William Van Alstyne of the Duke University Law School before the Subcommittee on the Constitution on May 21:

> (I)f Congress leaves within the appellate jurisdiction of the Court the power to "decide" a case on the merits, and yet so denies or restricts any "remedy" the Court is authorized to use with respect to its decision that in no meaningful, constitutional sense can it be said that the prevailing party's constitutional rights have been vindicated (rather than forfeited), that, as well, is unconstitutional. Congress does, of course, have great latitude in respect to the furnishing of legal remedies. But in no case may it so reduce remedies to such an extent that, in the Court's own view, its inability to furnish such remedies is essentially not different than to make the prevailing party the "losing" party instead. In brief, minimal remedies, imperative to the very substance of a constitutional right, may not be forbidden under claim of the "exceptions" or "regulations" clause.

Our position on the general question of congressional power to regulate federal court jurisdiction has been set forth extensively in testimony delivered on behalf of the ACLU by Professor Telford Taylor before the Constitution Subcommittee on May 21. Attached is a copy of Professor Taylor's prepared statement.

Thank you for the opportunity to appear before the Subcommittee.

Senator EAST. Thank you, Mr. Shattuck.

Mr. Taylor?

STATEMENT OF WILLIAM L. TAYLOR, DIRECTOR, CENTER FOR NATIONAL POLICY REVIEW, CATHOLIC UNIVERSITY LAW SCHOOL

Mr. TAYLOR. Thank you, Mr. Chairman. I appreciate the opportunity to present testimony here today.

Because of the short timespan, I did not have a prepared statement submitted to the subcommittee, but I would like permission to supplement the record.

I have also provided a copy of my statement to Senator Hatch's Subcommittee on the Constitution last week because it addresses issues that are very relevant to your considerations here today.

I, like Mr. Ward, also represent school boards. I have represented school boards in Wilmington, Del., and Indianapolis, Ind., but the school boards I represent are seeking and, in both of these cases, successfully seeking to desegregate schools on a metropolitan basis.

I also represent black plaintiffs in a number of cases, including the current St. Louis case.

I concur fully with Mr. Shattuck's conclusion that the bills before you are unconstitutional. I would add only three points that I think are important to a full understanding of the nature of their constitutional infirmities.

First, S. 528 and S.1147 cannot be saved from unconstitutionality by a claim that they do not impair the constitutional right to equal protection of the laws but only seek to constrain in various ways the remedy that may be ordered by Federal courts.

The reason that this argument is unavailing is that the Supreme Court has made it very clear that in school desegregation cases there is no dichotomy between the right and the remedy—they are coextensive.

That conclusion emerges clearly from the Supreme Court's decisions in the *Swann* and *Milliken* cases. In *Swann*, the Court said that the controlling principle of its decisions was that the scope of the remedy is determined by the nature and the extent of the constitutional violation. In *Milliken*, the Court made it plain that even where there were undisputed violations of the Constitution remedies would not be approved if they went beyond what is necessary to cure the constitutional violations.

So, in *Milliken*, despite the fact that there were patent violations within the city of Detroit and also violations that affected the suburbs, the Court concluded that there could not be an interdistrict plan.

More recently, the Supreme Court, in the first *Dayton* case in 1977, refused to approve a systemwide plan requiring busing because the record findings at that time were that the violations were only isolated.

So, the Supreme Court has said emphatically that it will only order remedies that are required to cure the constitutional violation. Yet, it has also said that the types of remedies that would remain if the legislation before you were enacted often are not sufficient.

In *Swann*, the Court said that desegregation plans cannot be limited to the walk-in school. In *Davis*, which is a companion case to *Swann*, the Court said that neighborhood school zoning is not, per se, adequate to meet the remedial responsibility of local school boards.

In *North Carolina Board of Education* v. *Swann*, which, as Mr. Shattuck said, involved a State statute which, like S. 1147, barred assignments and busing on the basis of race, the Court said the statute would deprive school authorities of the one tool absolutely essential to fulfillment of the constitutional obligation to eliminate the existing dual system.

THE BASIS FOR BUSING ORDERS

Why is it that seemingly neutral policies like neighborhood or geographic assignment are not adequate to remedy constitutional violations in some cases? The Supreme Court addressed this question both in the *Swann* and in the *Keyes* case.

In *Keyes*, it was dealing in Denver with practices by school officials such as the racial use of optional zones, racial transfer policies, racial site selection procedures, and a number of other segregative practices, The Court said these practices have the clear effect of earmarking schools according to their racial composition and they may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.

What the Court was saying was that, appealing as it may sound, a neutral or a so-called neutral system of neighborhood assignment is inadequate to deal with constitutional violations because it leaves out of account the fact that racially separate neighborhoods themselves are a product of school segregation laws and policies.

In that connection, I might just mention briefly the *Baton Rouge* case. I do not pretend to be an expert on it, and, frankly, Mr. Chairman, I do not think this is the forum to try the *Baton Rouge* case, but I am aware that Judge Parker entered an order in that case on May 1 of this year.

Among the things that he concluded—and this case has been pending in the courts a long time—was that the board for 20 years has used its control over sites to increase rather than decrease segregation.

Mr. Ward made a reference to the temporary buildings. The Court concluded that these temporary buildings were used at white schools to perpetuate segregation and found those schools inferior, victimizing the white children who attended them, and he ordered those schools closed.

Over the long run, those are the kinds of practices that have an impact on neighborhoods and that result in orders by courts to bring about desegregation.

The Court found in this case—and I am quoting—"a failure of leadership, courage, and wisdom on the part of local school officials."

It did not order all-black schools closed. All-black schools will remain in that district where, in the judgment of the Court, busing is infeasible. It did not accept the Government's plan. It made its own judgment on the plan.

In short, Mr. Chairman, while purporting to circumscribe only remedy, the bills here before you would strike at the heart of the constitutional rights guaranteed by the 14th amendment.

DEFECTS OF PENDING BILL

Second, I think the unconstitutionality of these bills becomes even more patent when one examines particular provisions.

For example, as I read it, section 3(c)(2) of Senator Johnston's bill, S. 528, would bar a court absolutely from ordering the assignment of a student across the school district line.

That would mean that, even when State authorities deliberately establish separate school districts for blacks and for whites—which was a common practice a number of years ago in some jurisdictions—courts would be divested of authority to deal with that egregious violation of the Constitution.

Other parts of S. 528 are less blatant, but they are equally troublesome. For example, there are two other sections of 3(c)(2) that would place limits on the times and distances of transportation based on actual—which I think means average—time and distances that other students are transported.

The trouble with these sections is their inflexibility. In some jurisdictions, the average time is far less than the maximum time that some students travel, and others travel distances which may seem very large but because they are on interstate highways the times are very short.

The Supreme Court in the *Swann* case did put limitations on busing time and distances. It recognized that there are differences in local conditions, and the Court left it to the trial courts to apply them. I would suggest it would be wise for Congress to do the same. You cannot legislate nationwide on conditions that are so different from district to district.

Other provisions of section 3 would require the courts to determine what is an educational purpose and when an order might lead to white flight or have a net harmful effect on the quality of education.

Apart from the vagueness of such language, it would call for the courts to engage in sociological speculation of the very kind that people who say they are strict constructionists usually urge the judiciary to avoid.

Certainly, the Federal courts should try to fashion plans—and they do—that will enhance educational quality but always within the framework of what is necessary to correct the constitutional wrong.

ERRONEOUS FINDINGS IN BILLS

Third, Mr. Chairman, I think the constitutional infirmities of S. 528 and S. 1147 are manifested by the erroneous character of the findings on which the sponsors would have Congress act.

Senator Gorton said here this morning that such findings are vital to this legislation, and if they are I would put it to you that they provide a totally inadequate basis for congressional action.

The last comprehensive hearings—really the only comprehensive hearings—on this subject were held by the Senate Select Committee on Equal Educational Opportunity from 1970 to 1972 when it was chaired by then-Senator Mondale.

They resulted in some 20 volumes of reports which include not only the testimony of lawyers and the experts but of parents, of community leaders, of students, of teachers, of school superintendents. Those hearings and the report of the committee reach conclusions that are diametrically opposed to the findings that are included here in the bills today.

I would suggest that those hearings do need updating, but if you were to have the same kind of hearings I think you would come to the same conclusions that the Mondale committee did in 1972. As I said, those are conclusions that are opposite to the findings in the bill.

For example, section 2(b)(5) of S. 1147 would have the Congress find that assignments based on race have not produced an improved quality of education.

As my testimony in Senator Hatch's committee spells out in some detail, this finding is totally unsupported by the evidence which shows significant achievement gains for black students and no achievement losses for white students following desegregation. That conclusion applies to Charlotte-Mecklenberg, N.C., as well as a great many other districts.

It is also of interest that the National Assessment of Educational Progress which came out with its report just last month found that during the 1970's black children made significant gains in the public schools in reading achievement, more gains than other students.

And do you know where the largest gains took place? They took place in the Southeast part of the country—the very region where school desegregation, including substantial busing, occurred throughout the 1970's.

Similarly, the finding in section 2(a)(1) of S. 528 that orders requiring transportation result in an "exodus of children from the public school systems" is unsupported by the evidence.

Here, I would direct your attention to pages 6 to 8 of my testimony. I would plan to supply the subcommittee with additional information and references.

The basic findings are that school desegregation plans, like Charlotte-Mecklenberg, like Nashville-Davidson, and like Tampa-Hillsboro, far from causing white flight, are very stable and, indeed, in many cases lead to integrated housing patterns.

Senator Johnston quoted as one of his principal supports the Coleman report on white flight in 1976. He said that that was diametrically opposed to the report of Dr. Coleman in 1965. Well, the two reports dealt with totally different subjects. The first report dealt with achievement in the public schools, and the other dealt with stability.

The second Coleman report is fatally defective because what Dr. Coleman did was to look at cities where desegregation had never been ordered and concluded that whites were leaving them. He finally recognized that error, and he ultimately came to the conclusion that there really was not any difference over the long run in cities where desegregation was ordered and cities where it was not ordered.

There is a continuing trend to white suburbanization, and if we are concerned about that, the way to deal with it, clearly, is not to forgo the constitutional rights of children in those cities.

Again, as I said, I would be glad to furnish the subcommittee with information from a number of sources on this subject, and I do not think people are in basic disagreement about that point.

To the extent that some desegregation plans are less successful than others in producing achievement gains, avoiding white flight, achieving community acceptance, and stimulating increased parental participation, busing is not the explanation. To the contrary, the research shows that the most successful plans in terms of achievement gains, stability, and community acceptance are those which, like Charlotte-Mecklenberg, are metropolitan in character and involve substantial busing.

Piecemeal plans that do not involve the whole community are the ones that generate sometimes conflict and instability.

It is commonsense, I believe. What parents care about is not so much the means by which their children travel to school but the quality of the education they receive. The latest polls on this subject show that in many communities parents say that after 3 years these plans are quite acceptable.

If Congress, on the basis of these erroneous findings, were to act to limit the ability of the courts to devise remedies for unconstitutional segregation, it would only be mandating the continuance of unlawful segregation, but it would also be enacting bad educational policy.

Last, as Mr. Shattuck has noted, S. 1147 goes beyond S. 528 and almost every other piece of legislation I know about by barring State and local agencies as well as the courts from adopting desegregation plans.

This, frankly, Mr. Chairman, is special legislation directed at the city of Seattle which is one of the few communities in the Nation to adopt a desegregation plan without the compulsion of a Federal order.

In this respect, the bill goes counter to the Supreme Court's decision in *Swann* that says that local communities and State authorities in the interests of pluralism, diversity, and racial understanding ought to be free to adopt their own plans, even when they are not compelled to do so by law.

It goes counter to the whole principle of local control over education that has received so much bipartisan support and so much support in court decisions, and it would bring about Federal intrusion in a local situation for no reason at all.

Since this is a voluntary plan, it is up to people in Seattle at this time whether they want to keep it or not, and the Congress of the United States ought not to tell them that they cannot keep it.

It is also conceivable that S. 1147, because it talks about racially neutral assignment and because it talks about not ordering reassignment for racial purposes, might actually be construed by the Court not to bar school desegregation, including busing. This is because it is not done for purposes of racial assignment, but for purposes of fulfilling the Constitution. But I think it would be unwise for Congress to put that kind of pressure on the courts.

Last, I would say, Mr. Chairman, I have been working on these cases, as you have noted, for a long time. I started right after the *Brown* case. I was involved in the Supreme Court's decision representing black plaintiffs in the *Little Rock* case.

It is interesting that times have changed. We have made progress. People are no longer saying, as the predecessors of some of the witnesses here today would have said, that it is segregation forever, and condemning the *Brown* decision and all that goes with it. But it has been a long, tough haul to try to achieve what the Constitution guarantees.

We will not serve anyone well—all of us who care about the public schools—at this point in our history when we have made progress in the South, when the job is to complete the task of eliminating illegal segregation in the North—if the Congress steps in on the basis of an inadequate record and tries to deal with the situation. I hope you will not do that, Mr. Chairman.

Senator EAST. Thank you, Mr. Taylor.

[The prepared statement and Appendix A and B of Mr. Taylor follow:]

Prepared Statement of William L. Taylor

Presented to the
Subcommittee on the Constitution

May 14, 1981

Mr. Chairman and Members of the Subcommittee:

My name is William L. Taylor and I serve as Director of the Center for National Policy Review, a civil rights research and advocacy organization located at Catholic University Law School. My interest and involvement in school desegregation issues spans a period of more than twenty-five years. In the 1950s, as an attorney with the NAACP Legal Defense and Educational Fund, I worked on several school cases that followed the Supreme Court's decision in Brown v. Board of Education. In the 1960s, as Staff Director of the U. S. Commission on Civil Rights, I supervised public hearings and studies on school desegregation issues including the 1967 report on Racial Isolation in the Public Schools prepared at the request of President Lyndon Johnson. Over the past ten years, I have served as counsel for black parents or city school boards in several lawsuits where the remedy sought in federal court was metropolitan in scope, including cases in Wilmington, Delaware; Indianapolis, Indiana; and St. Louis, Missouri. The Center has conducted research and published reports on a variety of school issues, including the most recent study, Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns, written by my colleague Diana Pearce in November, 1980.

Because of this longstanding interest and involvement, I welcome the Committee's invitation to participate in these oversight hearings on school desegregation. Few issues have been the subject of so much public misinformation and confusion. Some elected officials and community activists have centered attacks on desegregation on the use of busing, neglecting the fact that the real concerns of parents go far more to the quality of schools than to the means of transportation. Some journalists have concentrated their reports on a single moment in time--the conflict that frequently occurs when desegregation plans are first implemented, ignoring both the past and the unfolding story of how the plans work after they have been in operation for several years. Some academics continue to use the Brown decision as a playground for theories, often highly abstract, about the role of courts and government in dealing with social problems.

What is often neglected in all of this is children and their interests in attending public schools that are operated in conformity with the Constitution and that meet their educational needs.

While school desegregation is a subject that Congress has addressed with some frequency in recent years--often in last-minute riders to appropriations bills--there has been very little effort to develop information through the process of legislative investigations and hearings. The only comprehensive investigation that the Senate has ever done was conducted by the Select Committee on Equal Educational Opportunity, chaired by then-Senator Mondale, from 1970 to 1972. Those hearings and the Committee's report produced extremely useful information which should be tapped in any consideration of legislative measures today. But the Mondale Committee report is now eight years old and it would be essential, if Congress is again going to consider legislation, to develop a complete record on the many important developments that occurred during the 1970s. Today, I would like to provide a brief overview on the current status of school desegregation in the courts and on what has been learned about the educational and community effects of plans that are in operation.[1]

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[1] Because this testimony was prepared on short notice, I ask the Committee's permission to file a supplemental statement for the record.

1. Legal status. Contrary to suggestions that the courts have engaged in "sociological experimentation", school desegregation has been judicially required only when acts of intentional racial discrimination have been proven. The Supreme Court and virtually all lower federal courts have been consistent on this point from the Brown opinion through the most recent Supreme Court decisions in the Columbus and Dayton cases in 1979. The heart of the Brown case, in my view, was the right of black people "to exemption from unfriendly legislation...implying inferiority in civil society."[2] This fundamental point about the basis of Brown now is widely understood as applied to the state mandated or authorized dual systems that existed in the South and Border states. The point is less widely understood about the school desegregation cases that have arisen in the North and West.

Yet from the Supreme Court's first decision involving the North in 1973 (Keyes v. School District No. 1 of Denver, 413 U.S. 189), through the decisions in Columbus and Dayton, it has insisted that desegregation will be ordered only where plaintiffs have proved "a current condition of segregation resulting from intentional state action..."[3] Any examination of the record and lower court findings in Northern cases where desegregation has been ordered would disclose a plethora of intentionally discriminatory practices by school authorities--racial gerrymandering, discriminatory site selection, segregative transfer policies, the racial use of optional zones, discriminatory teacher assignments--which over time have contributed to the establishment of a segregated system. Those who express puzzlement about how conservative federal judges could order what appear to be sweeping remedies need only examine the cases to learn that the judiciary has been faithful in performing its function--applying well-established principles of equal protection of the laws to the record evidence.[4]

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[2] The Court was quoting from Strauder v. West Virginia, 100 U.S. 303, 307-308 (1879). Similarly, in Bolling v. Sharpe, the companion case to Brown involving the District of Columbia schools, the focus was on the fact that governmentally-segregated schools were a racial classification not reasonably related to any proper governmental objective. 347 U.S. 497, 499.

[3] 413 U.S. at 205-206.

In cases involving claims for inter-district or metropolitan relief, plaintiffs have faced an additional burden since the Supreme Court's decision in Milliken v. Bradley.[5] They are required to prove not only the existence of racial intent by public officials, but that the discriminatory acts had substantial effects throughout the metropolitan area. The courts have determined that this burden was not met in Detroit and Atlanta but that such inter-district violations were established in cases arising in Wilmington, Delaware and Indianapolis, Indiana.

The courts have exercised similar care in devising remedies for the constitutional violations they have found. They have operated under the equitable principle articulated in Swann, Milliken and other Supreme Court decisions that the scope of the remedy should be tailored to match the scope of the violation. Before ordering systemwide relief, that ordinarily requires substantial busing, courts have required a demonstration that the effects of the violation were significant and pervasive. Where the violations that have been foundwere only isolated, as in Dayton I [6], the Supreme Court has refused to sustain orders for systemwide relief. At the same time, the courts have recognized that purportedly neutral remedies such as "neighborhood assignment" may be woefully insufficient to cure the violation. In Swann and Keyes, the

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[4] Several years ago, our Center prepared a chart listing the intentional violations found by the courts in major Northern cases. If the Committee believes it would be useful, we would be glad to update our compilation and submit it for the record.

[5] 418 U.S. 717 (1974).

[6] 433 U.S. 406 (1977).

Supreme Court acknowledged that segregative school practices by public officials can have a profound influence on housing patterns, fostering racially segregated neighborhoods throughout a city or metropolitan areas. Even in these cases, however, the courts have drawn limits, based on time, distance and other factors, on the extent to which busing can be used as a remedy.

In addition to logistical limitations, the courts have also placed time limits on desegregation orders. In the Pasadena case [7], the Supreme Court indicated that the period allowed for active court supervision of the effort to "accomplish the affirmative duty to desegregate" and to eliminate official discrimination is a short one. Many lower courts interpret this to permit three to five years for requiring reassignments to maintain an integrated system, a brief period indeed to counteract the ingrained customs and attitudes fostered by decades of governmentally-imposed segregation.

In short, I believe that any careful review of the record of the federal courts in school desegregation since Brown will disclose that the judiciary has acted cautiously and prudently, disturbing the established order of segregated schools only where a convincing case of intentional discrimination has been made. If anything, if failing to come to grips with the major role, both historic and contemporary, that government has played in fostering conditions of racial separation in metropolitan areas, the Supreme Court has yet to follow through completely on the principles established in Brown.

2. Educational impact of desegregation. Contrary to suggestions that "busing has been a failure", school desegregation plans involving busing have led to educational gains, have proved stable and have been accepted by the communities involved.

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[7] Spangler v. Pasadena City Board of Education, 427 U.S. 424 (1976).

a) Desegregation has led to achievement gains. The most important current research on the links between school desegregation and achievement scores has been conducted by social scientists Robert Crain and Rita Mahard who analyzed carefully more than 100 case studies of desegregation. They found that in communities such as Sacramento, Fort Worth, Nashville, Charlotte-Mecklenburg and Louisville, the achievement scores of minority students increased significantly after desegregation. In only a handful of methodologically-flawed studies was there any indication of a decline in achievement among minority students. And no study has concluded that white students suffer academically from desegregation.

Crain and Mahard and other researchers have now gone beyond the question of whether school desegregation leads to achievement gains, to identify conditions under which it produces the best results.

In their most recent report, which became available last month, Crain and Mahard conclude that metropolitan or county-wide plans, which inevitably entail substantial busing, have been the most successful in leading to achievement gains for minority children. While this finding contravenes the conventional wisdom, it should not be surprising. Metropolitan or county-wide plans, while requiring busing, facilitate the creation of a school system in which almost all classrooms consist of advantaged children, an educational environment which all researchers agree is most likely to foster gains for disadvantaged students.

The Crain-Mahard findings also are supported strongly by the results of the National Assessment of Educational Progress published last month. The Assessment reports major gains for black children in reading during the past decade [8], particularly black children in the Southeastern states. It was in the Southeast that school desegregation orders were implemented on a large scale during the 1970s and where the plans have been metropolitan or county-wide in character, because no boundary line divides city from suburban districts.

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[8] For nine-year old black children, for example, average scores increased by 9.9%, while the overall gain for nine-year olds was only 3.3%.

b) Metropolitan desegregation has been stable and has achieved community acceptance. A few years ago, a great deal of public attention was focussed on reports that suggested that efforts at school desegregation were self-defeating because white parents inevitably would move away from racially mixed schools. It turned out that the conclusions of the most-publicized report were based on data from big cities where school desegregation had never been ordered. Demographers are now in agreement that, while school desegregation may have a one- or two-year impact, declines in the enrollments of central city schools stem far more from the continuing suburbanization of whites, a movement of more than 30 years' standing, than from desegregation orders.

A more accurate measure of the workability of desegregation plans can be taken in the South where plans have been metropolitan or systemwide. In districts such as Tampa-Hillsborough, Charlotte-Mecklenburg and Nashville-Davidson, these plans, involving extensive busing, have been in effect for about ten years and they have proved remarkably stable and successful. Their stability may be traced to the fact that, as I have noted, county-wide plans permit the establishment of classrooms consisting primarily of advantaged students. Despite the furor over busing, most parents are far less concerned about how their children get to schools than about the quality of their education. In many of the communities I have mentioned, parents and educators have worked hard and successfully to improve the quality of education after desegregation.

Certainly most parents, both black and white, would prefer that desegregation be accomplished without busing if that were possible. But a more concrete expression of public attitudes is contained in the recent New York Times/CBS News opinion poll showing that most people in communities that have undergone desegregation react favorably to the experience after the plans have been in effect for three years.

Indeed metropolitan plans may provide a long range answer to the concerns expressed about busing. Our Center's recent report, Breaking Down Barriers, contains a good deal of evidence that when public schools are desegregated on a metropolitan basis, the process actually leads to increased residential integration rather than to "white flight". This was the pattern in communities as diverse as Racine, Wisconsin; Witchita, Kansas; Riverside, California; and Charlotte-Mecklenburg, North Carolina.

As the courts have recognized, when schools are labelled by official practice or custom as "black" or "white", families tend to cluster around them on the same racial basis. Once schools are integrated, real estate brokers are less able to steer home-seekers along racial lines.

As housing integration increases, the need for busing declines.

c) Desegregation has led to other gains for both black and white children. The gains associated with desegregation go far beyond what can be measured on standardized tests. Over the past 15 years many more black students have enrolled in universities and in some graduate fields. Blacks have entered the professions and skilled trades in more than token numbers. Much of this breakthrough is attributable to the general crumbling of overt racial barriers, but some can be traced to the ways desegregated schools widen the horizons of minority youngsters. In Boston, for example, a researcher hostile to desegregation had to concede that black students from all income levels who were enrolled in integrated suburban schools wound up in better colleges and universities that their counterparts who remained in segregated schools in the city.

High schools, as D. W. Brogan once observed, are places "where students instruct each other on how to live in America." In central city schools, many students learn only the survival skills of the ghetto. In desegregated schools, both black and white children learn the skills of mainstream America.

Well-off white youngsters are victims of racial isolation as well. When they attend segregated schools, their learning experiences are constricted and a large part of the world they will have to function in is shut out. It would be interesting to contrast the experience of white students in segregated suburban schools with those in integrated schools such as Seward Park and Newtown in New York City where students use the whole city as their learning laboratory and enrich each other with knowledge of different languages and cultures.

Conclusion. In sum, Mr. Chairman, if the committee is able to take the time to amass the evidence and to examine it dispassionately, I believe it will conclude as did the Mondale Committee in 1972 that the body of cases from Brown to the present represent sound constitutional jurisprudence and that desegregation when properly implemented is sound educational policy.

Most people would agree, I think, that one of the few things that mars our strength as a nation and as a people is the stain of racial discrimination. Once before in our history, when some progress had been made, the laws that had spurred the progress were dismantled, with the observation by Justice Bradley that:

> When man has emerged from slavery, and by the aid of benefi-

> cent legislation has shaken off the inseparable concomitant of that state, there must be some state in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws.9/

Now, almost a century later, when we have made some progress in dismantling the racially dual society that governments created to replace slavery, there are echoes of the same views. It would be a tragedy if we made the same mistake twice.

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9. Civil Rights Cases, 109 U.S. 3, 25 (1883).

APPENDIX A. DESEGREGATION AND ACHIEVEMENT

Court orders for desegregation are based on the need to remedy discriminatory government practices that violate the constitution, not on social science judgments about the relationship of segregation to achievement scores. Nevertheless, any assessment of the effectiveness of court-ordered desegregation plans properly takes into account the effect of the plans on the academic performance of children.

Contrary to sweeping charges that desegregation has led to a decline in the quality of public education, the weight of the evidence demonstrates that plans, including those involving substantial busing, have led to significant achievement gains for minority students and have not harmed the performance of white students.

The first review of literature regarding the effect of desegregation on achievement scores was done by Nancy St. John in 1975[1] While she found that more studies showed improvement in black achievement scores, she declined to draw a definite conclusion because of the uncertain quality of many of the studies. Meyer Weinberg, in 1977,[2] reviewed substantially the same set of studies. He went further than St. John, concluding that desegregation did raise minority achievement scores. Krol (1978) also found a positive effect of desegregation on minority achievement.

Two recent studies by Robert L. Crain and Rita E. Mahard[3] are particularly valuable. The first study, "Desegregation and Black Achievement: A Review of the Research" (1978), reviewed 73 studies, including 32 studies previously reviewed by Weinberg and St. John.[4] They concluded that overall, desegregation did raise black students' achievement scores. While 40 studies showed significant gains, only 12 showed declines. Further, the authors pointed out that many of the studies showing declines were weaker methodologically.[5]

For example, a study done in Waco, Texas that found a negative impact on achievement used a sample group of only 55 students who were not matched as to age, grade and sex. Further, several studies not showing significant achievement gains were conducted during the first year of desegregation, when students are still adjusting to the impact of attending a new school or adapting to a new educational environment. Studies done after the second year tend to show more positive outcomes.

The second Crain and Mahard treatise, released in April of this year is entitled "Some Policy Implications of the Desegregation-Minority Achievement Literature." Here, the authors have collected all the available studies (93) on the effects of

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[1] N. St. John, "School Desegregation: Outcomes for Children" (1975).

[2] Weinberg, "Minority Students. A Research Appraisal" (1977).

[3] Robert L. Crain is a Senior Social Scientist at the Rand Corporation. Rita E. Mahard is an Assistant Social Scientist at the Rand Corporation and the University of Michigan.

[4] This chart sets out the findings of the respective authors in reviewing the achievment literature. Crain and Mahard noted that in choosing the 41 studies they reviewed separately, they purposely included more studies with negative results. This was a result of statistical methods which resulted in Crain and Mahard interpreting some small differences as negative results. This was a result of statistical methods which resulted in Crain and Mahard interpreting some small differences as negative rather than as zero. See the following table:

Effect	Reviewer of studies				
	C+M	St. J.	W	W+St. J.	Total
Positive	19	8	7	6	40
Zero	12	1	3	5	21
Negative	10	1	0	1	12
Total	41	10	10	12	73
Positive (percent)	46	80	70	50	55

[5] The best design is a randomized experiment. Here, desegregated and segregated students are chosen by the flip of a coin. Almost as effective is a design where black students in segregated schools are used as a control group, and both the desegregated and segregated students are pre-tested before desegregation begins. Weaker designs are those that have no control group, comparing black achievement scores to national norms, black students in the same grade a few years earlier, or white achievement scores. The general decline in nationwide achievement and the relationship between black and white achievement at different grade levels create serious problems in these studies.

desegregation on black achievement,[6] and removed extraneous effects of differences in methodology. Thus, they were able to arrive at some general conclusions regarding how black achievement scores are affected by desegregation and under what conditions the educational benefits of desegregation are greatest.

The studies reviewed by Crain and Mahard involved minority students in schools that have already been desegregated, as opposed to examining black achievement scores in general.[7]

Without exception the studies concluded that desegregation has no adverse effect on the achievement scores of white students. This finding includes districts in which substantial busing is utilized to achieve desegregation. As to minority students, Crain and Mahard found that not only did achievement scores rise for minority students in desegregated schools, but that on the average, their IQ scores rose an average of 4 points.[8]

The authors also sought to identify attributes of desegregation plans that have an impact on achievement. First, they conclude that the age at which desegregation begins is important. Students desegregated in kindergarten and first grade showed consistently higher achievement gains than those desegregated in later grades. Every sample of students desegregated at the kindergarten level showed positive achievement gains, while students desegregated for the first time in secondary school showed gains in about half the samples.

THE PROPORTION OF STUDIES SHOWING POSITIVE DESEGREGATION OUTCOMES, BY GRADE AT WHICH STUDENTS WERE DESEGREGATED AND TYPE OF RESEARCH DESIGN

[In percent]

Type of design	Grade of Desegregation					Raw average
	K	1	2–3	4–6	7+	
Random experimental	100 (1)	100 (8)	71 (7)	60 (5)	—	81 (21)
Longitudinal	100 (2)	73 (11)	46 (46)	62 (39)	69 (29)	59 (127)
Cohort comparison	100 (5)	78 (23)	56 (25)	40 (37)	45 (11)	56 (101)
Norm-referenced	100 (3)	0 (2)	43 (14)	37 (19)	0 (8)	35 (46)
Column average	100 (11)	77 (44)	50 (92)	49 (100)	52 (48)	56 (295)

In terms of long-term achievement gains, this finding assumes major importance. If the rate of achievement gain persists throughout the child's school years, the authors say, a minority child desegregated from the start would gain nearly 2 grade levels by the time she/he graduated from secondary school.[9]

Another factor relating to achievement gains is the comprehensiveness of the desegregation plan. Piecemeal plans that merely re-assign students from one school to another burden the students with making the adjustment on their own. Researchers have pointed out the importance of in-service training for teachers, administrators, school boards and supporting staff. Training programs that help teachers to recognize their own biases, give them knowledge of different groups' history and culture and prepare them for teaching more heterogenous classes have a positive impact on minority achievement, and on the overall effectiveness of the plan.[10]

One of the most important conclusions reached by Crain and Mahard is that the analyzed studies involving metropolitan or county-wide desegregation plans showed stronger gains than other studies. Studies of areas involved in metropolitan or county-wide plans included Hartford and New Haven, Connecticut; Newark, New Jersey; Nashville-Davidson County, Tennessee; Rochester, New York; and Louisville-Jefferson County, Kentucky. Every one of these studies showed sizable achievement gains for minority students. In Louisville-Jefferson County, black students' overall performance rose at a rate double that of white students.

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[6] There has been very little work on the achievement effects of desegregation for Hispanic students, but what research is available shows a similar pattern as the studies on black achievement. See Morrison (1972) and Coleman, et al., (1966).

[7] Studies examining black achievement in general fail to distinguish between "natural" integration and integration occurring as a direct result of a desegregation plan.

[8] The mean IQ score was 91. A four point gain would halve the gap between 91 and 100, a "normal" IQ. This finding also challenges the belief that IQ scores are an indicator of inate intelligence.

[9] This calculation takes into account the fact that the rate of achievement does not increase as the student moves from the lower grades to secondary school, but rather remains constant.

[10] See Gay (1978), Orfield (1975), Forehand, et al., (1976) and Lincoln (1976).

EFFECTS OF DESEGREGATION, BY TYPE OF SCHOOL DISTRICT SETTING

	Mean effect (standard development)	Number of samples
Central city	.065	(97)
Suburb	.021	(76)
Countywide	.119	(31)
Metropolitan	.144	(30)

One reason for the higher achievement gains in areas involved in metropolitan and county-wide plans is that these forms of desegregation represent the most complete form of socioeconomic integration, which has been cited by almost all authorities as an important factor in raising minority students' performance. See Coleman, et al., Equality of Educational Opportunity (1966) and Mosteller and Moynihan, On Equality of Education Opportunity, Random House (1972). The National Assessment of Educational Progress also noted considerable progress for black children in reading during the past decade, especially in the Southeast. This reflects the fact that large numbers of desegregation orders were implemented during the 1970s. Many of these plans are metropolitan in character, as no boundary lines separate urban and suburban districts.

CONCLUSION

From the available research, it is clear that there is a positive relationship between desegregation and improvements in minority achievement scores, and that desegregation has no detrimental effects on the scores of white children.

Especially significant is the positive relationship between metropolitan desegregation plans and the rise in black children's achievement scores. Legislation that would curtail the power of courts or other agencies to order inter-district desegregation or to use busing as a tool for desegregation would adversely effect the plans that have been most effective in improving academic performance.

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APPENDIX B. SCHOOL DESEGREGATION AND WHITE FLIGHT

Critics of school desegregation argue that it is self-defeating, as it leads to white flight and precipitates a significant drop in white enrollment in the public schools. James Coleman, a prominent sociologist, has been a particularly vocal critic. His 1975 study, Recent Trends in School Integration, is often cited in support of this proposition. When Coleman's report is examined together with other research on the topic, however, the results point to a quite different conclusion.

I. Large Cities. The claim that desegregation leads to white flight is limited to school desegregation that occurs in large cities with high proportions of minorities that are surrounded by virtually all white suburbs. Even in this situation, the claim is largely inaccurate. White suburbanization preceded school desegregation by several decades. It stems from many causes, including record levels of suburban housing construction; the movement of urban jobs to sububan facilities; and discriminatory housing practices limiting minority access to suburban housing.[1] White suburban out-migration persists in most large cities whether or not a desegregation plan has been implemented. Thus in 1979 in Boston, the site of the most intense recent resistance to a desegregation plan, the decline in white enrollment was less than one-third the level in Chicago, which has never experienced court-ordered desegregation.[2] Several factors cast doubt on Coleman's finding even as limited to large cities.[3] Coleman defined school desegregation as "any situation where there happens to be a significant number of black and white students in the same school at the same point in time." Thus, many of the cities used in his study had never operated under any desegregation plan. In fact, a New York Times research study of the twenty largest cities in the Coleman study failed to find *any* court-ordered desegregation in any of those cities during the 1968–1970 period he studied.[4]

Subsequent studies by Christine H. Rossell and Reynolds Farley examined the effect of school desegregation on pupil enrollment. Although their data base was similar to Coleman's [5] their conclusions were significantly different.

Looking at large cities where desegregation had been ordeed, they found that although desegregation had a limited impact on white enrollment during the first year,[6] by the third year of the plans' operation, the rate of decline in white enrollment had returned to pre-plan levels, and in some cases, was below pre-plan levels.

TABLE 2.—CHANGE IN PERCENTAGE WHITE FOR FOUR DESEGREGATION GROUPS AND A CONTROL GROUP CONTROLLING FOR CITY SIZE

Group	4 years	3 years	2 years	1 year	0 year	1 year	2 years	3 years	Signed level	Average Pre-series	Average post series
Large cities (500,000):											
High desegregation	−1.3	−0.7	−2.8	−0.4	−2.3	−2.3	−1.4		N.S.	−1.0	−2.0
Med. desegregation	−4.0	−1.0	−1.1	−.9	−1.1	−1.1			0	−1.8	−1.0
Low desegregation		−1.5	−1.7	−3.6	−.8	−.9	−.4		N.S.	−2.3	−.7
Control	−2.1	−1.3	−1.3	−1.9	−1.7	−1.6			N.S.	−1.6	−1.7

The above chart, from Rossells' study, charts the rate of white enrollment loss before and after desegregation in cities of 500,000 or more. High desegregation represents cities where more than 20 percent of all students were reassigned; medium, between 5 and 20 percent, and low, less than 5 percent. Cities with no desegregation plans were used for the control group.

Robert L. Green and Thomas F. Pettigrew confirmed both Rossell's and Farley's conclusions in a study which examined Coleman, Rossell, and Farley and also included their own findings.[7] Pettigrew and Green found that the cities on which

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[1] See Gary Orfield, "White Flight Research: It's Importance," Perplexities and Possible Policy Implications. (1975) Delivered at the Brookings Institution Symposium on School Desegregation and White Flight, August 1975. For a comprehensive historical analysis of Federal housing policy see Martin Sloane, "Federal Programs and Equal Housing Opportunity," from A Staff Report of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee (1976).

[2] Gary Orfield, "Voluntary Desegregation in Chicago, A Report to Joseph Cronin, State Superintendent of Education" (1979). In Los Angeles, cited by David Armour as the principal example of desegregation resulting in white flight, the rate of loss of white first graders during the first year of the desegregation plan was the same as Chicago during the same year. The overall rate of white student loss was higher, however, during the first year of the plan.

[3] Coleman actually issued four different versions of this report, which came to somewhat different conclusions. Many of his colleagues were concerned that the statements Coleman made to the media went beyond his findings. They were also concerned with the methodological strength of the reports and the frequency with which Coleman altered his findings. Green and Pettigrew, "School Desegregation and White Flight: A Reply to Professor Coleman" (1975).

[4] Christine H. Rossell, "School Desegregation and White Flight," Political Science Quarterly, vol. 90, No. 4, Winter, 1975–76.

[5] Rossell expanded substantially on Coleman's data by collecting data directly from each school district wherever possible.

[6] Rossell notes that increases in white flight usually occur just before the implementation of a school desegregation plan, indicating that this is a result not of problems experienced, but of the fear of problems.

[7] Robert L. Green and Thomas F. Pettigrew, "Public School Desegregation and White Flight: A Reply to Professor Coleman." Prepared for U.S. Civil Rights Commission, Washington, D.C., Dec. 8, 1975.

Coleman based his conclusion that white flight in large cities is a result of school desegregation were not at all representative of large cities that had undergone desegregation. Coleman, in fact, omitted Denver, Colorado; Miami, Jacksonville and Fort Lauderdale, Florida. All are large urban systems which had undergone school desegregation. Using a more representative sample of cities, Green and Pettigrew arrived at the same conclusions as did Rossell and Farley: That while white enrollment in the public schools does drop at a greater rate during the first year of a desegregation plan, this effect is generally short-lived.

II. Small and Medium-Sized Cities. It is also clear that the white flight phenomena does not apply in small and middle-sized cities. Cities such as Fort Wayne, Indiana; Stamford, Connecticut; Sacramento, California; and Ann Arbor, Michigan all retained a rate of white enrollment consistent with pre-desegregation years. Berkeley, California actually experienced an increase in white enrollment post-desegregation.

In Pontiac, Michigan, where nearly one-half of all black and white students were reassigned, and despite community conflict surrounding desegregation, by the second year of the plan the rate of white enrollment loss was lower than it was two years prior to desegregation.[8, 9]

TABLE 2.—CHANGE IN PERCENTAGE WHITE FOR FOUR DESEGREGATION GROUPS AND A CONTROL GROUP CONTROLLING FOR CITY SIZE

Group	−4 years	−3 years	−2 years	−1 years	0 years	1 years	2 years	3 years	Signal level	Average for series	Average post series.
Med cities (100,000–500,000):											
High desegregation	−1.3	−1.6	−0.3	−1.3	−2.0	−1.8	−2.2	−0.8	NS	−1.1	−1.7
Med desegregation	−.8	−1.3	−.6	−1.2	−1.2	−2.1	−1.1	−1.1	NS	−1.0	−1.4
Low desegregation	−1,3	−2.5	−1.8	1.3	−1.3	−1.6	−1.4	−1.3	NS	1.7	1.4
Control		−1.0	−2.0	−2.1	−2.4	−1.8	−1.3	−1.3	NS	−1.7	−1.7
Small cities (100,000):											
High desegregation	−2.2	3.3	−4.8	−1.8	−3.6	−1.2	1.1		NS	3.0	1.9
Med desegregation	−.2	.7	−1.2	−.2	−.7		−.9			−.6	−1.2
Low desegregation			−.6	−.5	−.7	−.3	−1.5				−1.7
Control					−2.2	−1.9	−1.6	−1.2			−1.7

III. Metropolitan and County-wide Plans. Pettigrew and Green, and others have also found that districts involved in metropolitan or county-wide school desegregation plans, which inevitably involve substantial busing, do not experience desegregation-related white flight. When a desegregation plan was implemented in Tampa-Hillsborough County, Florida, there was no white flight, despite the predictions of opponents to the plan. Private "white flight academies" soon closed, due to lack of enrollment.[10]

Rossell's study also showed that cities under metropolitan or county-wide plans such as Racine, Wisconsin and Riverside, California experienced a drop in the rate of white enrollment loss after desegregation.[11]

In fact, far from leading to white flight, evidence shows that metropolitan and county-wide desegregation may lead to increased residential integration. Dr. Diana Pearce, in a 1980 study,[12] examined seven pairs of cities matched for population, geographic location and the percentage of minority enrollment in the public schools. The only difference between each pair was that one city had experienced metropolitan or county-wide desegregation for a minimum of five years, while the other half had no metropolitan desegregation.

In each pair of cities, substantially greater reductions in housing segregation were found in the cities which had experienced metropolitan or county-wide school desegregation. In contrast to the short term effect of white flight, this trend toward increased residential integration was found to be cumulative over the years. In

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[8] For a complete list of all the cities used in Rossell's study, see attachment A.

[9] See p. 3 for chart explanation.

[10] Time Magazine, Sept. 19, 1979, p. 76.

[11] See attachment A.

[12] Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns.

Riverside, California, for example, after fifteen years of metropolitan school desegregation, only four of the twenty-one elementary schools required busing; the remainder of the school attendance zones had become sufficiently integrated residentially so that busing was no longer necessary to maintain racial balance in the public schools.

The study suggests several factors which explain this result. First, eliminating segregated, racially identifiable schools in an entire metropolitan area removes a means of facilitating segregative housing choices.[13] Second, when schools are desegregated on a metropolitan basis, no matter where one lives, one's children will attend desegregated schools. Further, in some desegregation plans, integrated neighborhoods become the only neighborhoods that are exempt from busing and retain their neighorhood schools. This exemption provides a powerful incentive for both minority and majority families to create stable, integrated neighborhoods. Louisville-Jefferson County, Kentucky operates under a metropolitan desegregation plan which exempts blacks who move into an area where they are a racial minority from busing. In conjunction with counselling given to low-income families after the plan went into effect, many black families have moved from the city to white suburban neighborhoods. Hundreds of black students have been automatically exempted from the transportation aspects of the plan over the past 5 years.

Additionally, as enough black families move into a neighborhood to improve the racial balance of a given school attendance zone, it is possible for the entire school to be exempted from busing, enabling all the students, black and white, to attend their neighborhood school.[14]

When coupled with the finding that minority children's achievement scores were found to rise the most in districts with metropolitan desegregation [15], it becomes clear that metropolitan and county-wide school desegregation plans may be an effective, long range tool to achieve integrated schools, stable integrated neighborhoods and better educated children in both large cities and more rural areas.

CONCLUSION

Extensive social science evidence on school desegregation and white flight shows that:

(1) In large cities with substantial minority populations, a drop in white enrollment may follow a school desegregation order during the white enrollment may follow a school desegregation order during the first year, but in succeeding years the rate of white pupil loss usually returns to pre-desegregation levels. The major causes of white suburbanization have little to do with school desegregation and the rate of white flight is not different in cities that do not have court-ordered desegregation.

(2) In small and medium-sized cities, there is little or no effect of desegregation on white enrollment loss.

(3) Districts that have metropolitan and county-wide desegregation plans do not experience white flight or white pupil loss as a result of desegregation. Indeed, these types of plans have led to increased residential integration.

Proposed legislative findings that school desegregation remedies required busing lead to white flight are unsupported by the evidence. To the contrary, legislation that would curtail the use of busing as a remedy would eliminate metropolitan plans that have proved stable and have led to residential integration.

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[13] In fact, a survey of real estate agents in the cities showed that in the cities with metropolitan desegregation, brokers were more willing to show both black and white customers housing in all areas of the city, which also helps create integrated neighborhoods.

[14] Staff Report 80-1, Kentucky Commission on Human Rights, Frankfort, Ky.

[15] See Crain and Mahard, "Some Policy Implications of the Desegregation-Minority Achievement Literature" (1981).

ATTACHMENT A

APPENDIX 2: CHANGE IN PERCENTAGE WHITE FROM THE PREVIOUS SCHOOL YEAR COMPUTED FOR EACH YEAR BEFORE AND AFTER SCHOOL DESEGREGATION +

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)	(20)	(21)	(22)
			Change in % White Students							Major	Change in % White Students									Average	Average	
School District	% Students Reassigned	Court Ordered	-7 Years	-6 Years	-5 Years	-4 Years	-3 Years	-2 Years	-1 Year	Plan Date	+0 Years	+1 Year	+2 Years	+3 Years	+4 Years	+5 Years	+6 Years	+7 Years	Signif Level	Pre-series	Post-series	Total Deseg.
Pasadena, Calif.	98.48	yes		-2.7	-1.5	-1.9	-2.1	-2.0	-2.4	1970	-4.2	-4.5	-2.5*						01 .05	-1.2	-3.7	100.80
Pontiac, Mich.	83.47	yes		-1.3	-1.0	-3.0	-3.1*	-1.7	-2.4*	1971	-5.4	-.4							02, .02	-2.1	-2.9	87.09
Berkeley, Calif.	57.72					-2.2*	-2.2	.7	-1.6	1968	-2.2	-.5	-.8	.2	.9				N.S.	-.9	-.3	66.32
Wichita, Kans.	44.36			*	-.8*	-.4	-.4*	-1.0*	-1.0*	1971	-1.3	-1.4							N.S.	-.7	-1.4	56.63
San Francisco, Calif.	42.49	yes			-2.9	-1.2	0	-4.1	-.2	1971	-3.0	-2.1*							N.S.	-1.7	-2.6	46.58
Ft. Wayne, Ind.	34.60				-.4	-.5	-1.6	.2	-1.1	1971	-.8	-1.0							N.S.	-.7	-.9	34.00
Waukegan, Ill. (el.Schl's)	31.72	yes				-1.3	-3.5	-7.8	-1.1	1968	-1.8	-1.9	-1.1	-1.0	1.9				N.S.	-3.4	-1.5	31.72
Denver, Colo.	24.64	yes				-1.3	-1.4	-1.5	-.6	1969	-1.5	-2.4*	-1.4	-2.0*					N.S.	-1.2	-1.8	29.77
Providence, R.I.	24.10									1967		-2.0	.2	-.2*	-1.7*	-1.0			a	a	-.9	36.00
Riverside, Calif.	21.40							.7	-.6*	1966	-1.5	-1.2*	.9	-2.2*	-1.0	-1.4	-1.5		N.S.	-.1	-1.1	38.20
Las Vegas, Nev.	19.24	yes				.3	-.6*	-.6*	0	1972	-.8								a	-.2	-.8	30.05
Evansville, Ind.	15.77	yes		-.1*	-2.2	-.3	-.1	1.2*	-.3*	1972	-.7								a	-.8	-.7	29.57
Muncie, Ind.	15.10					.3	-.9	-2.6	1.9	1972	-.3								a	-.1	-.3	15.10
Stamford, Conn.	13.20				-2.6	-1.3*	-.8	-1.8*	-1.8	1970	-1.5	-.9	-1.5						N.S.	-1.7	-1.3	21.42
Niagara Falls, N.Y.	11.76						*	-.4*	-.6	1970	-1.3	-.5	-.7						N.S.	-.5	-.8	30.26
Sacramento, Calif.	11.10	yes						*	-1.3	1966	-.2	1.2	-.3*	-1.0	-1.1	-1.1	-1.0		a	-1.3	-.5	19.98
Oklahoma City, Okla.	10.82	yes						-2.2	-1.1	1968	-1.6	-4.9	-1.2*	-.4	-1.6				N.S.	-1.7	-1.9	11.50
Saginaw, Mich.	9.60					-2.6	-.5	-.6	-2.3	1972	-2.2								a	-1.5	-2.2	9.60
Grand Rapids, Mich.	9.40				a					1968	-3.1	-.9	-.3	-1.8	-2.2*				a	a	-1.6	10.16
Springfield, Mass.	9.10					-1.8	-1.8	.9*	-3.7*	1968	-1.3	-1.9	-2.7	-2.2	-2.0*				N.S.	-1.6	-2.0	23.05
Ann Arbor, Mich.	9.00								-.5	1965	-.1	-.1	-.9	-2.3	-.6	-.8	-1.1	-1.2*	a	-.5	-.9	15.48
Lexington, Ky.	8.91									1967		.2	0	-.4*	-.3	-.4			a	a	-.2	9.66
Baltimore, Md.	7.92			-6.2	-1.5	-4.0	-1.0	-1.1	-.9	1971	-1.1	-1.1							N.S.	-2.5	-1.1	7.92
Tulsa, Okla.	7.83	yes		-.1	-.2	-.4	-4.8	-.1	-.6*	1971	-.5*	-1.9*							N.S.	-1.0	-1.2	14.36
Peoria, Ill.	7.83									1968	-.8	-.9*	-1.0*	-1.1*	-1.4*				a	a	-1.0	15.86
Cambridge, Mass.	7.30		-.6	0	-.1	-1.8	0	-1.2	-.9	1972	-.9	2.0							N.S.	-.7	.6	7.30
Lansing, Mich.	7.18					-.2	-.6	-1.1	-2.2*	1969	-.7	-1.8*	-1.4	-2.1*					N.S.	-1.0	-1.5	22.54

APPENDIX 2: CHANGE IN PERCENTAGE WHITE FROM THE PREVIOUS SCHOOL YEAR COMPUTED FOR EACH YEAR BEFORE AND AFTER SCHOOL DESEGRATION (CONT.)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)	(20)	(21)	(22)
	% Students Reassigned	Court Ordered	Change in % White Students							Major Plan Date	Change in % White Students								Signif. Level	Average Pre-series	Average Post-series	Total Deseg.
School District			-7 Years	-6 Years	-5 Years	-4 Years	-3 Years	-2 Years	-1 Year		+0 Years	+1 Year	+2 Years	+3 Years	+4 Years	+5 Years	+6 Years	+7 Years				
Racine, Wisc.	6.80							-1.1*	-.4*	1967	-.5	-.4	-.7*	-.8	-.1	-.9			N.S.	-.8	-.6	12.30
Tacoma, Wash.	6.50						-.7	-.7	-.3	1968	-1.4*	-.6*	-.9	-.9*	-.1				N.S.	-.6	-.8	9.44
San Bernardino, Calif.	5.10						-.9*	-.1	-.7	1970	-.8	-1.3	-.5						N.S.	-.6	-.9	7.10
Minneapolis, Minn.	4.90			-.6	-.4	-1.5	-1.0*	-1.3	-1.0*	1971	-1.5	-1.3							N.S.	-1.0	-1.4	11.16
Waterbury, Conn.	4.80							-2.4	-1.3	1970	-.9	-1.7	-.5						N.S.	-1.9	-1.0	4.80
Rochester, N.Y.	4.30			-2.4	-2.5	-1.6	-3.0	-2.8	-2.4*	1971	-3.3	-3.1							N.S.	-2.4	-3.2	5.16
Seattle, Wash.	4.14		-1.0	-1.1*	-1.5	.6	-.8*	-.9	-1.6	1971	-1.5	-1.1							N.S.	-1.1	-1.3	10.25
Dayton, Ohio	3.20								-.6	1969	-1.1	-1.4*	-2.0	-2.0					a	-.6	-1.6	3.96
Buffalo, N.Y.	3.20									1967	-2.5	-4.0*	-1.3*	-1.3*	-1.2	-2.2			a	a	-2.1	5.79
Warren, Ohio	2.80								-.5	1969	-.7	-.3	-.5	-.9					a	-.5	-.6	2.80
St. Paul, Minn.	2.57									1965		•	•		-1.0	-.5	.7	-.5	a	a	-1.3	6.77
South Bend, Ind.	2.50							-1.3	-1.0	1970	0	-1.2	-.9		(less decline than expected)				N.S., .05	-1.2	.7	3.80
Rockford, Ill.	2.40								.7	1969	.9	-1.3	-.6	-1.1					a	.7	-.5	2.40
Flint, Mich.	2.39						-3.5	-1.5*	-2.0	1971	-2.9	-1.7*							N.S.	-2.3	-2.3	3.69
Syracuse, N.Y.	2.20						-2.6	-1.4	-1.7*	1967	-1.9	-1.8*	-1.7	-2.0	-1.7	-2.0*			N.S.	-1.9	-1.9	3.65
Colorado Springs, Colo.	2.10							.4*	-.3	1971	-.1	-.2							a	.1	-.1	2.30
Indianapolis, Ind.	2.02	yes			-1.3	-1.0	-.2	-1.4	-1.7	1970	-1.1	-1.9*	-1.7*						N.S.	-1.1	-1.5	3.06
New York, N.Y.	1.76				-2.0	-1.9	-1.8	-1.6	-2.2	1964	-2.6	-2.9*	-2.0*	-3.0*	-2.9*	-3.3*	-2.3*	-1.4 -1.3	.02,N.S.	-1.9	-2.4	7.67
Pittsburgh, Pa.	1.44							-.3	-.5*	1968	-1.7	-.5*	-.5*	-.4	-.8	-.8*			N.S.,.02	-.4	-.8	3.18
Toledo, Ohio	1.20								-4.3	1969	-.5*	.2	-1.0*	-.2					a	-4.3	-.4	1.37
Waterloo, Iowa	1.91							-.6*	-.4	1971	-.6	-.4							a	-.5	-.5	2.25
Gary, Ind.	1.30									1967		-2.2	-1.6	-1.3	-2.4	-1.5*			a	a	-1.8	1.64
Milwaukee, Wisc.	1.10		•			-.3	-2.4	-.3	-2.5	1972	-1.9								a	-1.4	-1.9	2.02
Louisville, Ky.	.83					-.9	-1.2	-1.0	-.5	1972	-2.2								a	-1.9	-2.2	.83
Des Moines, Iowa	.82							•	0*	1969	-.1	-.4	-.3	-.6					a	0	-.4	1.10
Los Angeles, Calif.	.68						.2*	-1.5	-1.8*	1971	-1.6	-1.5							a	-1.0	-1.6	1.56
E. St. Louis, Ill.	.29									1967		-3.7	-2.5*	-4.2	-4.3*	-4.4			a	a	-3.8	.73
Kansas City, Mo.	.26					2.4	-1.9	-2.7*	-1.6	1969	-1.8	-1.6	-1.9	-2.3*					N.S.	-2.1	-1.9	.44
Detroit, Mich.	.25					-4.5	-1.8	-1.9	-1.9	1967	-1.3	-1.9	-2.8	-2.0*	-1.2*				N.S.	-2.5	-1.8	.26
San Diego, Calif.	.19							-1.2	-2.0	1967	-5.6	.1	-.5	-.2	-.4	-1.3			N.S., .01	-1.6	-1.3	.19
Chicago, Ill.	.17						1.4	-1.4	-4.9	1968	-3.7	-1.6*	-1.5*	-2.0	-1.8*				N.S.	-2.5	-2.1	.46
Philadelphia, Pa.	.02		-2.0	-3.0	-1.0	-1.3	-1.4	-.9	-1.1	1972	-.1								a	-1.8	-.1	.02
Hartford, Conn.	.01						-3.8	-3.7	-2.5	1968	-3.6	-4.7	-3.7	-1.9	-2.3				N.S.	-3.3	-3.2	.01

APPENDIX 2: CHANGE IN PERCENTAGE WHITE FROM THE PREVIOUS SCHOOL YEAR COMPUTED FOR EACH YEAR BEFORE AND AFTER SCHOOL DESEGRATION (CONT.)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)	(20)	(21)	(22)
			Change in % White Students								Change in % White Students									Average	Average	
School District	% Students Reassigned	Court Ordered	-7 Years	-6 Years	-5 Years	-4 Years	-3 Years	-2 Years	-1 Year	Major Plan Date	+0 Years	+1 Year	+2 Years	+3 Years	+4 Years	+5 Years	+6 Years	+7 Years	Signif. Level	Pre-series	Post-series	Total Deseg.
Control Group:																						
Akron, Ohio	0						-1.0	-1.0	-1.0	–	-1.0	-.7	-.9	-.5	-1.1				a	-1.0	8	0
Albany, N.Y.	0								-3.1	–	-1.8	-2.2	-1.1	-2.1	-1.1				a	-3.1	-1.7	0
Albuquerque, N.M.	0									–		-1.3	-.3	-.5	-.4				a	a	-.6	0
Boston, Mass.	0						-1.4	-.3	-1.5	–	-3.9	-2.5	-1.9	-2.6	-1.9				.05, .01	-1.0	-2.6	0
Camden, N.J.	0									–	-4.4	-2.7	-2.3	-2.8	-1.8				a	a	-2.8	0
Charleston, W. Va.	0									–	.1	-.2	0	-.1	.1				a	a	-.0	0
Cleveland, Ohio	0									–	.2	-1.2	-1.0	.1	-.3				a	a	-.4	0
E. Orange, N.J.	0									–	-4.7	-3.9	-1.2	-1.4	-2.6				a	a	-3.6	0
Erie, Pa.	0									–	-.3	-.7	-.6	-.2	-.9				a	a	-.5	0
Hamilton, Ohio	0									–	-.2	-.2	.3	-.2	-.2				a	a	-.1	0
Jersey City, N.J.	0									–	-3.9	-2.1	-2.9	-1.0	-2.0				a	a	-2.4	0
Kansas City, Kans.	0									–	-3.3	-1.6	-.9	-2.0	-1.7				a	a	-1.9	0
Lima, Ohio	0									–	-1.3	-1.5	-.5	-1.4	.6				a	a	-.8	0
Omaha, Neb.	0									–	-1.3	-.6	-.1	-.5	-.6				a	a	-.6	0
Newark, N.J.	0							-3.0	-2.2	–	-2.7	-2.9	-.9	-2.0					N.S.	-2.6	-2.1	0
Santa Monica, Calif.	0									–	.1	-.6	-2.1	-.6	-.9				a	a	-.8	0
Trenton, N.J.	0									–	-4.1	-2.2	-1.9	-1.8	-.9				a	a	-2.2	0
Utica, N.Y.	0									–	-1.3	-.6	-.7	-1.4	-.5				a	a	-.9	0
Washington, D.C.	0				-2.3	-1.9	-1.8	-1.4	-1.5	–	-2.1	-.6	-.5	-.6	-.4				N.S.	-1.8	-.8	0
Portland, Oreg.	0						-.6	-.3	-.2	–	-2.5	-.9	-.6	-.9	-1.1				.02, .01	-.4	-1.2	0
Passaic, N.J.	0									–	-7.8	-2.6	-3.7	-3.4	-2.4				a	a	-4.0	0
Paterson, N.J.	0									–	-3.8	-3.1	-3.9	-2.3	-1.5				a	a	-2.9	0
Phoenix, Ariz.	0									–	-1.4	-1.1	0	-1.2	0				a	a	-.7	0
Wilmington, Del.	0						-3.0	-2.3	-3.4	–	-3.9	-7.1	-3.9	-1.3	-1.8				N.S.	-2.9	-3.6	0
Youngstown, Ohio	0									–	-.1	-2.0	-1.4	4	-1.6				a	a	-1.1	0
Springfield, Ill.	0									–	-.5	-1.1	-.5	-.4	-1.0				a	a	-.7	0

*Additional desegregation implemented.
N.S. = not significant.
a = unable to compute.

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Mr. WARD. Mr. Chairman?

Senator EAST. Yes, Mr. Ward?

Mr. WARD. If I might, I would just very briefly respond to a couple of comments the gentleman made.

Senator EAST. I will tell you what I would like to do, if you would not mind, and then I will be happy to come back to you, Mr. Ward. I just want to get some points in for the record before we let time slip too far away on us, and then I will be happy to come back to you, if that would be permissible.

Mr. WARD. Fine.

Senator EAST. Thank you.

I found all the comments this morning very useful and valuable. I would like to direct my remarks primarily to Messrs. Shattuck and Taylor and get their response.

I would like to shift the focus of the discussion to a little different level just to try to get an angle on it.

Just to give you a little bit of an idea of where I am coming from on this thing, I have had training as a lawyer—a licensed attorney—and have had training as a political scientist and teacher of political science, and I have had experience, obviously, in the real world of politics.

I find with my brethren in the legal profession, as much as I greatly respect that they are human and their training, a tendency to get their focus on a problem so narrowly legalistic that they seem to be sometimes to be outright indifferent or oblivious to the fact that we are talking about an ongoing society and political system.

The issue is political. I do not mean that in a cynical sense but in terms of a policy-making sense. Maybe speaking a little bit as the political science professor here, you have a policy problem here of major proportions.

Let me move on to another point just to try to get at the meat of that. This issue, along with a few others that one might list, which I will not worry you with right now—there is deep and profound public interest in them. People feel very strongly about it.

I would argue, really, that the public on this question of what at least they perceive as being forced busing, massive busing of the kind that Mr. Ward is pointing out there—a great many people out there in the real world of American politics—black and white—and I am not suggesting I speak for everyone now, but I am just telling you as one man who has been out there in that real world—feel that kind of thing makes no sense.

It does not have to do with constitutional rights. It does not have to do with eliminating discrimination. It is an obsession with something they cannot put their finger upon. It is a perverse result. It is contrary to the idea of community. It is contrary to their own personal wishes as a family. It strikes them as visionary. It is an abstraction.

To force them to accept the result on very narrow, legalistic rationales—they just intuitively, as a matter of gut feeling, do not buy that.

I suppose a comparison I might make is this: In the *Dred Scott* case of 1857, those who liked that decision probably said:

> Look, the black man is a piece of property. That is a constitutional provision held by the Court. They are not people or persons within the meaning of the Constitution. That is that. The Court has ruled on it. Now, we don't want to hear any more about it.

Well, there were a lot of people in this country—not a majority maybe, but a powerful minority—who did not buy that argument, the Supreme Court notwithstanding and with all due respect to them. They said:

> We do not look upon the black people as pieces of property. They appear very human to us, and we are going to begin the political movement to make them a part of the American constitutional system. We might do it through legislation, we might do it through constitutional amendment.

But to advise them: "Look, the issue has been settled now; the Court settled it; be quiet, we want to hear no more of it," is simply unrealistic to expect.

The problem you come back to in a democratic society is that, ultimately, major policy questions—which slavery was, or this issue of busing is—have profound political and policy implications and, at some point I am going to remind you again—and I might sound a little professorial here—are going to be resolved in the political arena. They are going to be resolved in the legislative halls some way or other.

The fact that you have been before Senator Hatch's subcommittee, the fact that you are before this one now, is some evidence, and the fact that we had an election last November that I am here, and this sort of thing. There is a message there where the political scientist would see that there is a desire to change this kind of policy.

People simply do not buy the argument that in order to have racial equality, in order to treat blacks and whites equally, you must go through the kinds of contortions they are going through down in Baton Rouge.

There are just too many Americans, black and white, that do not look upon that as the litmus test of your commitment to racial equality. They just do not buy that. Again, it is not the world in which they live. They live in communities, they have families, they go to neighborhood schools.

The idea, perhaps, of freedom of choice, or degrees of mobility, or equality in terms of job opportunity or in terms of general mobility—the idea that you must have racial balances in schools as an integral part of a policy of equality and fairness they simply do not accept. They do not buy that. What you are seeing is a profound movement to try to change this in the political arena.

All I can say to you is that there is going to be a response to it, whether it is statutory, as we are considering here, or whether it is constitutional.

I am not suggesting it is simple or it is easy, but to argue that all potential attempts are going to be unconstitutional as, in a way, you are suggesting these two bills are unconstitutional, as you put it—perhaps—but, as Senator Johnston said, as we always know in the real world of constitutional law, let us see.

If we had passed it, we could challenge it in the courts. It could go to the Supreme Court. If the Court said: "For reasons A and B it is constitutionally defective," perhaps Congress could remedy those. If not, we might go to a constitutional amendment.

I am trying to put it in the broadest context of American democratic politics. The country today is weary of that kind of thing. I do not think I exaggerate it in saying that. We are going to have to, in the Congress, find a remedy to it.

I find as one Senator and I found in campaigning, that there are so many things where the public says: "Why can't you do something about this?" We say, "Oh, because the courts have held otherwise." They say: "Why can't you do something about that?" "Because the bureaucracy has held otherwise." And so it goes.

Finally, people say: "Well, apparently you people in the Congress don't have any authority to do much of anything." And all I can say is: "Well, I suppose you are right." We simply acquiesce in what the court decides we shall do or what bureaucratic elites decide we shall do.

I can tell you, out there in the hinterland, as a beneficiary of last November, people are weary of it. They are weary of it in the sense of saying: "Look, you folks, see if you can't find some fair, reasonable, prudent, commonsense remedy to it." And this busing one hits that tripcord very hard and very fast.

I do not mean to go on here too much lecturing you on it. I am trying to convey to you—not lecture you—the intense political effort and desire in this country to do something. People in legislative bodies, be they in the U.S. Congress, or at the State level, or whatever, are not indifferent to that.

The Court, it occurs to me, has become insensitive to the political dimension of American politics. They think it is simply a matter of issuing edicts and rules and regulations. The bureaucracy has done the same thing. They just, I fear, overdid what they thought was a good thing.

There is a strong movement, for example, to rein in the bureaucracy. There is a strong movement to rein in the courts. There is a strong movement by the American people to reassert their participation in making major policy decisions and, in this case, on the busing issue.

I do not wish to dismiss all of your very fine remarks as being irrelevant and not germane, but they are intensely legalistic.

You say it will be found unconstitutional. You say this is "one of the rights, and the remedy must be there." It is missing, again, this political dimension that we have to cope with and to deal with.

I often like to point out to people on this matter of the civil rights movement in the United States since 1945—and, again, I speak as a political scientist—probably the most successful thing that we have had in the civil rights area has been the 1964 Civil Rights Act. And do you know what? Because it was the deliberative process of the Congress.

Congress was involved in trying to reach a commonsense solution on public accommodations and fair employment practices. Public accommodations—look at how that has been accepted in this country. Some people did not want it at that time.

But I tell you, at least in defense of the 1964 Civil Rights Act, they hacked that thing out here in the Congress, and you had the legislative body make the decision, and it should happen in a democracy on major policy questions.

Once the legislative chamber has made policy, that is going to diffuse major opposition because people have had their say, they have been a part of it, and we tend to live, as much as we can, with those policy decisions. We reevaluate them. We may modify them over time.

But where we have ruptured this process—and I would personally agree with the import of the remarks here this morning by Mr. Ward and Senator Johnston—I sometimes sense a counterproductive aspect of this. It is antagonizing people. It is actually inflaming a situation. It is distracting from the really legitimate problems of how might you improve the opportunities for blacks in American society.

We are all bogged down and arguing over busing and whether this is the ultimate litmus test. I do not wish to speak for all white America, let alone black America, but I have a feeling in my own political bones that the vast majority of whites and blacks in this country would say:

> Yes, this is not the real issue. The real issue ought to be focused upon jobs, housing, and opportunities, and all other kinds of things.

There is nothing inherently inferior about a black school or a black community. There is something inherently inferior when you are not concentrating your resources and your talents in trying to improve people in American society, whatever particular community they might live in.

I do not wish to dismiss your very fine points and your very well-stated points cavalierly, but I can say, as one person, I suspect we are going to take some decisive action in this area. We are only quarreling over what kind, what form, and what shape, it will take.

Where it goes, I do not know, in terms of what the Court will say, but there will be continued pressure for the near term and the long term to resolve this busing question. The opponents of it, I would recommend, better sit back and look at the total political context in which this has taken place and see if, perhaps, they cannot come up with a better rationale than they currently have for justifying the status quo, which is politically wholly unacceptable in too many parts of the country.

If you might respond to that, Mr. Taylor, and then—Mr. Ward—I will get back to you and let you get in your points.

Mr. TAYLOR. I certainly do want to respond briefly.

Senator, I do not view this wholly as a legal problem, and my testimony was briefly directed to the educational aspects of it. Let me turn now to the human aspects of it as well.

We are dealing with a problem which I think everybody would agree is a tremendously difficult problem in this society. For years, through enforced action by the State, we have treated black people very badly, first through slavery, then through the order of segregation.

It is not surprising that when we come to the point of trying to cope with that situation, that it should be difficult to deal with.

Over many years of enforced segregation, blacks have learned to fear whites and whites have learned to fear blacks. So it should not be a terrible surprise that when the time comes to remedy that situation it becomes very difficult.

But the fact of the matter is that over a period of time we have begun to address those problems, and the courts have played—I would say to you, Senator—a heroic role against all kinds of pressures in trying to work these problems through calmly and ably.

They have, frankly, not been assisted very much—except during the period in the 1960's when Congress and the President took leadership—by the politicians because the politicians issued the southern manifestoes and responded to the worst fears of people.

You look at a situation such as the situation in Charlotte-Mecklenberg in your own State. I will not say the problems are all solved there, but when that decision came down the people of Charlotte-Mecklenberg got together to make it work.

Ten thousand volunteers came into the school system, and people in Charlotte-Mecklenberg today say that they have improved the quality of education for all people, black and white, as a result of their efforts.

I have been around to these communities—I am not just filing a legal brief here—and I know some of the difficulties and some of the fears that you are speaking about. But if we treat it calmly, if people do not lose their nerve and do not lose their principle, they come through it.

A couple of years ago when Congressman Mottl put forward a constitutional amendment on the floor of the House of Representatives, Congressman Mendel Davis from South Carolina said:

> We have worked through these problems in the South. Why should we be carrying water for the North because it has taken the North so long to address those problems?

I do not see, frankly, sir, how you can provide opportunity for minority students—blacks, Hispanics, and others—by herding them together and continuing to herd them together in isolated schools, regardless of how much money you spend on those schools. And we are not spending more money on them, as you know, these days, as has come out.

What this is all about is finally enabling people to be a part of this society. We tried once before in the Reconstruction Era, and that effort was dismantled.

Now, after we have made some progress, if you are saying to us that the Congress is going to act to try to dismantle that progress, I think it would be a very sad day indeed.

I am not resting my case entirely on the unconstitutionality of these bills because I think grave damage will be done even if these bills are ruled unconstitutional. I do not see the demand in the country that you seem to see on this, sir.

I think if you took the testimony of people from communities that have undergone this process you would find that many of them have accepted this and feel they are on the road to recovery.

I would say, just in conclusion, that while I am, I think, as great an advocate as anyone for fair housing, for equal employment opportunity, for adequate programs to address the needs of those who need a hand in this society, I hardly see any evidence in the Congress of the United States today that that is the way they are addressing these problems.

So, to say that we will forgo school desegregation and turn to something, to put it most kindly, is blinking the facts of the matter.

Thank you.

Senator EAST. Let me just respond briefly to that, Mr. Taylor.

You use the word herding—herding minorities—Hispanics or blacks. It is a sort of revealing term to me. Again, I do not wish to make too much of the point and engage in overkill with it, but there is a certain implication in all of this busing rationale that a predominantly black community, perhaps, or Hispanic, or whatever, is inherently inferior—that is, that these people are herded into communities and they would really much prefer not to be in those communities.

Do not misunderstand me—I do not mean that they do not want to improve the quality of life in terms of jobs and housing and opportunities for their children, but it strikes me—and you, I am sure, would vehemently disagree—as a little patronizing—that these poor folks have to live in their communities with one another and have their own institutions and their own schools.

How, for example, does one account for a great university like Howard University? Is not this troublesome? Or how does one account for the great black community in Washington, D.C., or in Harlem in New York? Ultimately, you reach a logistics problem.

Are we suggesting that a child in a large black-populated area of a large city in America who is basically involved in the black community is some way or other herded into an inferior existence for an indefinite period of time?

First of all, logistically, there is no answer to it; and, second, I do not buy that premise, and most Americans do not. We are working on very different premises here, and I would submit, frankly, Mr. Taylor—and we can all argue the weighing of the figures, the statistics, and the majority is on our side or the majority is on the other side.

I dare say there are precious few people in America today in public life who take a strong, adamant position that forced busing is a good thing and find a strong public response to it.

I find the defense of it primarily confined to lawyers in the field or those who have become, I would say, obsessed with the idea that this is the only remedy to an incredibly complex problem.

I can certainly say that in North Carolina—I speak with some authority for that State—forced busing is not at all popular.

You say: "Well, people have endured it. They have lived through it." Well, of course, people endure many things in life. Life is imperfect, and it involves tragedy and sorrow and pain. The fact that people suffer through a particular court edict does not necessarily mean that is evidence why we ought to continue to maintain it.

We ultimately, in my assessment, come back to an intense problem of the reality of man. People are social creatures. They live in communities. We have got to respect, to some degree, the policy judgments of those communities, of the American Nation as a whole.

What you are proposing, I am as convinced as anything convinces me in the real world of American politics today, does not enjoy any serious degree of popular currency or support, and there will continue to be great movement to change it.

However well and however eloquently you state your point, too many people—and I will admit—including myself, will not accept the rationale under your terms. We operate from different assumptions.

Your idea of what it would take to have racial equality, or fairness, or generosity, or humaneness, or kindness, or goodness in terms of race relations—I simply do not look upon forced busing as the litmus test of whether you have that commitment, and just too many Americans would share that, and, I suspect, black and white.

Mr. TAYLOR. Senator, I will not take much more time, but just to clarify a couple of points. When I used the word herding, while it may be colloquial, I used it advisedly.

Why do you suppose that judges, who often come from conservative backgrounds, who go through the political process in order to get their appointments, are ordering desegregation, including busing, in the way that they are?

The fact is that they are exposed in a very intensive way to the causes of school segregation when they hold hearings in these cases.

Judges have come in initially very sceptical, but after they have heard testimony about the building of physical barriers to confine a black community, about the way the Federal Government has operated through the FHA programs to deny housing opportunities to blacks, to promote the use of racially-restrictive convenants, to break up neighborhoods, and to force blacks into a confined position, I do not think the word herding is too strong at all.

Minority people simply have not been given that choice. What we are talking about is taking steps to give them that choice.

You mentioned logistics. The fact of the matter is that it has been demonstrated—and I hope you will make a record on this—

that the logistics of bringing about desegregation in metropolitan areas is much easier if you can cross that line.

Take the city of Hartford. There is white community at one end of town and a black community at the other end of town. But that black community is right next door to a suburban school district where it would not be at all difficult to bring about segregation.

So the logistics are not the problem. Obviously, where the logistics are a problem, the courts will say, as they did in *Swann,* that we are not going to order any kind of desegregation that will be detrimental to the education of any of the students involved.

You mentioned Howard and the community here. I think it is ironic that the progress that has been made under the Supreme Court's decisions, under the 1964 Civil Rights Act, is being used as the enemy of continuing this effort.

Certainly, people make it on their own. They make it against the worst odds. But the fact is that, since we have begun to open up this society, many more people have made it. And people say: "Well, there are these people over there. They have made it. Why do we need any more desegregation?"

I repeat to you, Senator, what we are talking about is people finally being able to be a part of this society—to make their own choices.

I do not think—when you get down to it—the concerns of black people are any different from the concerns of white people. They want a better opportunity for themselves and for their children.

If we remove these constraints—if we finish the job of removing these constraints—in the public schools as well as other areas, we will be a much better society.

Senator **East**. I do not disagree with your goal. We obviously have a strong difference of opinion over whether this is an appropriate remedy to the achievement of that goal.

Perhaps, to some extent, this has made it beneficial. We have narrowed the scope of our difference, although you may well still feel that by curtailing or eliminating this remedy you ultimately impair very seriously the achievement of the goal. I respect your opinion on that.

I suppose I have made it more than clear—perhaps ad nauseum—that I do not share that view, but I would like to think that the hearings this morning have been beneficial to clarify, maybe, what it is we are disagreeing over and whether this is an appropriate remedy to the achievement of the common end.

Mr. Ward, you wanted to ask a question?

Mr. Shattuck, we will let you come back next if you have something you would like to add. Let us do that. Maybe we can wrap it up in the next 10 to 15 minutes. We had planned to go to 1 o'clock. Maybe we can take 15 minutes and then be finished.

Go ahead, Mr. Ward.

Mr. **Ward**. Before I respond to the remarks, I would like to respond to your statement and the comment you made, and I am going to agree with Mr. Taylor, in part, in doing so.

You mentioned, Mr. Chairman, that 50 years ago, so far as the legalistic part of it was concerned, in the Supreme Court, we had *Plessey* v. *Ferguson.* That was changed and reversed in *Brown.*

Since then, we have made a great deal of progress on the real problem, which is racial prejudice.

Senator **East**. Could you pull the mike a little closer?

Mr. **Ward**. Yes, sir.

We have seen the Supreme Court go from *Plessey* v. *Ferguson*, by which you can assign students or people to different places or accommodations because of their race, to *Brown*, saying that no, that is now unconstitutional.

We go further than that, and we make progress. There is no question but that during the 1960's and early 1970's considerable progress in eliminating and decreasing racial prejudice and discrimination was made, as Mr. Taylor indicated.

My concern is that now the Court is going so far in reaching for a mathematical concept that you are reversing the trend and that the racial prejudice and the racial discrimination is now coming back. That is what we want to avoid.

Racial prejudice is not a one-way street. Blacks have racial prejudices against whites, just like some whites have against blacks.

I can remember one time a fifth circuit decision—Judge Brown wrote it, I believe—in which he said:

> Loath as judges are to articulate constitutional principles in the dry terms of arithmetic, it is no longer the spirit that counts, it is the numbers.

When you say that in terms of education, and children, and a school system, then you have gone to the destruction of education, because that is what education is all about. You have got to formulate and build with that spirit.

What concerns me is that the progress Mr. Taylor referred to that we made is now being thrown out the window because the courts have now gone too far in what they are ordering, and the people as a whole cannot accept it.

Another thing that bothers me in this is, for example, in the *Rapides* case. We had a young man testify—I say young—he was 38 or 40 years old, black, married with two children. He had moved to Alexandria in about 1970.

When he first moved there, he and his wife and their two small children were living in an apartment. As his salary increased, as he was promoted, they ultimately bought a house.

He testified that he looked all over Alexandria and finally decided that the house he liked and the neighborhood he liked was on Lincoln Road. That is in the predominantly black area. He looked at both schools in that area—Lincoln Road Primary and Jones Street Junior High.

He found that they had good staffs, black and white teachers, good principals, were well-run schools, and they bought their house on Lincoln Road. He had one child at the time he testified in the primary and one in the junior high.

And he objected to the Government and the Court now saying they were going to take his child out of Jones Street Junior High and bus his child across the river to Pineville.

That is a black man. It is his constitutional rights, supposedly, that Mr. Taylor has been referring to. He objected to moving his child out of the neighborhood school.

I go back. The history of our country has been a history of basically neighborhood schools—communities living together. We have ethnic populations and ethnic areas all over our Nation in all of our big cities. We have Italian neighborhoods, we have Polish neighborhoods, and in my State we have French neighborhoods and English neighborhoods—or redneck neighborhoods, as they call them sometimes—where blacks and whites were getting to know one another on a voluntary basis and finding out that human beings are human beings and should be accountable because of their conduct and not because of their race or color.

When you throw them together against their wishes, particularly their children, you eliminate that. All of that goes by the board. That is my concern. That is why I am here to testify in favor of some legislation—even if it turns out to be unconstitutional—that will tell the courts that the sense of the people is that they are destroying what they are trying to do. I will close on that.

Mr. Taylor made a few remarks that I wanted to respond to earlier. I just cannot leave them sit. He was talking about Baton Rouge, and I certainly do not want to try the *Baton Rouge* case before this subcommittee either.

With respect to building buildings, you build buildings normally where the children are. When an area grows and outgrows the building, you either build a new building or you put up T buildings if you cannot afford it.

If you do not do that, then those people who moved there—you have got to pick them up and bus them back across town somewhere. That generally is not an acceptable procedure. It may be a court-ordered procedure now.

He mentioned that the district court was found to be in bad faith and showed no leadership. May I remind Mr. Taylor and the subcommittee—and what I want you to understand is—that in 1970, as I mentioned earlier, that East Baton Rouge Parish School Board voluntarily, when the biracial committee came up with a desegregation plan that was acceptable to the plaintiffs and acceptable to the court—that same court, U.S. District Court for the Middle District of Louisiana not only said we were unitary, it said the school board had acted in good faith throughout in trying to solve the problem.

It came back in 1973 or 1974, after *Swann,* with a motion for further relief, to reexamine the school system, appointed outside court's experts to come in and examine the system, again found that we were unitary—desegregated faculties, desegregated extracurricular activities and transportation—and again commended the board for its good faith efforts.

That was the same court—a different judge. Has that judge been so wrong over these past 10 years, and it is now this judge that all of a sudden happens to be right?

I submit to you respectfully that, regardless of the findings of the district court, they helped make his decision stand up. But those findings of a lack of leadership are simply not correct.

That is all I have to say.

Senator East. Thank you.

Mr. Shattuck?

Mr. Shattuck. Mr. Chairman, I will just make a couple of comments to follow what I think is an extremely eloquent presentation by my colleague, Mr. Taylor, and recognizing that the exchange between you and Mr. Taylor, was something of an elucidation of some of the points here.

I do not deny—not only do I not deny, but I clearly recognize that the problems that are being discussed in this subcommittee are real flesh-and-blood political problems involving the lives of people, their future, the future of their children, and the way in which they are going to live for a large part of their lives.

I do not rest my case on the question of the unconstitutionality of these measures before the subcommittee, but I would like to make a couple of brief comments about the law and about the courts, because I think, in your discussion with Mr. Taylor, you were tilting substantially away from the protection that the law is intended to give in this society to minorities—to minorities who, in many instances, cannot participate, by definition, in the same way that the majority can in the political system.

Our system of law, and particularly constitutional law, is what differentiates our system of government from so many others in the world where minorities are not given the kind of protection that we get here.

I think that we must not, in the noise of the time and the concern of some people who are stating that they oppose certain things that the law is proposing to do, lose sight of that central fact. If we do, then a great deal of our system becomes less protective of minorities, and the flesh-and-blood problems of those people who are subject to that kind of protection, I think, become even greater.

Second, the courts are the vehicle for the protection of the rights of minorities. Of course, I am not talking here just about racial minorities either. I am talking about minorities in the society of all points of view—minorities with political perspectives as well.

Judges are, indeed, political. As Mr. Taylor has pointed out, they have come through the political system in order to get their appointments, so they are certainly not immune from the political considerations that you have been discussing this morning.

But they have a particular job to perform in this society, which is to sit and hear evidence, and hear evidence in a court of law from both sides, and in the fairest possible manner that we have been able to devise in our system—I think in many ways considerably fairer than the system of evidence-giving in the Congress, in that both sides of a point of view have to be very carefully balanced and represented.

So the courts have the role of protecting the rights of minorities. If we take away that authority or affect it in any very significant way, which I think is what is being proposed here this morning, that is damaging to all of us.

It is damaging to all of us because the game of attacking the Federal courts and their essential role in protecting minorities in this country can be played by all ends of the political spectrum, and I think the fact that Congress has not done this up until now and the fact that the Congress so wisely rejected the attack on the Supreme Court that was leveled by a liberal administration in the Roosevelt era, I think demonstrates that ultimately people recognize that the courts are essential in dealing with these flesh-and-blood problems.

So I do not deny that this is a hard flesh-and-blood political question, but I think it is very important not to shortsell the courts and the law, and particularly the constitutional law as defined by the courts, in trying to reach a decision about what to do about it.

Finally, I would associate myself with virtually everything that Mr. Taylor has said in the colloquy that he has had with you.

Senator EAST. Gentlemen, I wish to thank all of you for coming. I would like to feel, if nothing else, this morning we have at least begun a record here on which we can build and ultimately make a judgment.

We will certainly leave the record open for matters you might wish to submit. Without objection, they will be inserted together with your prepared texts.

Certainly, the staff on both sides can continue to remain in touch for additional comments or information that we might need.

I thank you, and unless I hear serious objection to the contrary we shall stand adjourned.

[Whereupon, at 1:10 p.m., the hearing was adjourned.]

COURT-ORDERED SCHOOL BUSING

WEDNESDAY, SEPTEMBER 30, 1981

U.S. Senate,
Subcommittee on the Separation of Powers,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2228, Dirksen Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Present: Senators Baucus, and Heflin.

Also present: Senator Charles E. Grassley from Iowa, a member of the full Committee on the Judiciary.

Staff present: James McClellan, chief counsel; James Sullivan and Craig Stern, counsels; Debbie Freshwater, clerk; and Ken Kay, minority chief counsel.

CALL TO ORDER

Senator East. I would like to call the session to order.

We begin hearings this morning on S. 1647 [1] and related matters.

I would like to welcome our distinguished panelists this morning, our audience, and my distinguished colleague, Senator Grassley of Iowa, who we are going to recognize immediately because he has some other pressing business he must go to.

He is not a member of our subcommittee, but he is here to speak on behalf of, or to introduce, Dr. Ralph S. Scott, Jr., who is a distinguished educator from Senator Grassley's great State of Iowa.

Senator Grassley, with your approval, we will let you have the floor for a moment.

Senator Baucus from Montana, the distinguished ranking minority member of this committee, should be here very shortly. He is tied up in another meeting at the moment, but we expect him any minute.

Senator Grassley?

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator Grassley. Thank you, Mr. Chairman.

Ralph, it is a pleasure for me to be here, even though I am not a member of this subcommittee, to introduce you to my colleagues and to tell them that they are going to find your testimony very valuable in formulating policy before this committee.

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[1] A copy of S. 1647 can be found in the appendix.

Ralph, as I refer to him, I know so well that I do not have to look up his name in the phone book to dial his home phone, or his office phone either.

I have consulted with him on many occasions when I was a member of the State legislature and when I was chairman of the education committee of the Iowa House of Representatives in the years 1969 to 1973.

He is not only a constituent of mine, but he is on the faculty of what I refer to as my university. In the jargon of Iowans, that is the university that generally gets less appropriations from the State legislature because it is not as big as the land grant university or the University of Iowa. This is the University of Northern Iowa.

I am proud of anybody who is affiliated with my university, the University of Northern Iowa. It is the university of one of my sons who is now attending there, as well as my wife who is now a full-time student at the University of Northern Iowa.

We are very lucky that you, Ralph, could take the time from your teaching schedule to come to Washington and share your reasoned views on busing with us.

I want to emphasize the term "reasoned," because I think too often in this debate we only get the emotional arguments. He has received his notoriety from the research that he has done on this subject, Mr. Chairman.

I want to say a few words about his background. He is director of the education clinic at the University of Northern Iowa. He holds a Ph. D. in educational psychology from the University of Chicago. He is the author or coauthor of 3 books and over 30 articles which have appeared in national journals of education and/or psychology.

He is noted for his contribution to a program in Iowa that we call home-start which has been federally funded—a program designed to aid parents who want to teach their preschool children in the home.

There is a lot more that I could say about Ralph, but I know that you want to receive the testimony from everybody else.

He has been a consultant in other States on this subject of busing. I have said he has done the research; but in a very real sense, he is a scholar. He is a commonsense educator who is not afraid to challenge tradition.

That is what I like about Ralph Scott—the fact that he will seek his own answers, and he is willing to challenge tradition. It does not matter whether it is an educational tradition or a political tradition.

In the area of busing we obviously are up against both political tradition and now, after 25 years, educational tradition.

Welcome, Ralph.

OPENING STATEMENT OF SENATOR JOHN P. EAST

Senator **East**. Thank you, Senator Grassley. We appreciate your coming and introducing your distinguished constituent here.

We would be delighted to have you stay as long as you would like, realizing of course that you have other matters to attend to. We do appreciate your coming.

I would like to recognize my distinguished colleague and the ranking minority member of the subcommittee, Senator Max Baucus of Montana. It is always a great pleasure to work with him. I welcome him this morning.

Senator Baucus, we have so far simply heard from Senator Grassley who has a constituent here who is one of our witnesses. He was making a few remarks.

What I thought we might do is proceed. I had not yet made a statement; I thought I would make a brief statement. Then you could do likewise. Then we would proceed with our panel if that sounds satisfactory to you.

Before we turn to our witnesses, and I guarantee you we will do that very shortly after the preliminaries and ceremony, I would like to welcome you and remind you that we will be with you very shortly.

As chairman of the subcommittee, I would like to take the liberty of just a few minutes to describe what it is I think we are doing and what we hope to be doing so the interested parties and the public generally and the press and so forth might know at least where I as one person think we are going and what we are doing.

We are planning a series of 3 days of hearings—today and tomorrow and also on October 16—dealing with S. 1647.

Our hearings today will focus more upon the educational and community impact of busing, be it good or not so good. Tomorrow we will be discussing the constitutional implications of this bill and related matters. On October 16, we have a member of the administration coming, as it now stands, as well as colleagues from the Senate and House who will be coming.

A list of these witnesses for today and tomorrow and on the 16th has been made available for anybody who would like to know who these people are.

We have made every effort, in cooperation with all the staff—majority and minority—to try to get a balanced presentation here, because it is one of those issues in which there are not only differences of opinion but I am fully aware of it—I think we all are—there are very strong differences of opinion. It is appropriate that the points of view be heard and be heard as thoroughly and exhaustively as we can within the confines of hearings, which by definition, I presume, always must be limited.

Senator Baucus and I at this point feel that 3 days of hearings should be adequate to the task. If at the end of that time we decide it is not, we have no built-in prohibition against extending them. We want to do justice to the subject.

I go into it in that spirit, and I certainly know that he goes into it in that spirit also.

The subject before us is S. 1647. This is a specific bill that I have proposed, but I would like to make it clear that I do not consider this particular measure sacred. I have no vested interest in it.

I do feel it gives us a point of reference to begin this discussion, and it is in that spirit that I offer it.

These hearings are exploratory, as well as the bill. What final form, if any, legislation comes out of this subcommittee of the Judiciary Committee I do not know.

I consider it our responsibility, and my particular responsibility as chairman, at least to proceed with the hearings and the discussion and the dialog and see where it ultimately comes out in the near term.

I do suspect that at some point this subcommittee and the Judiciary Committee will be reporting something out to the entire Senate. However, I repeat, the exact form and nature of it I do not know because no one should be so presumptuous as to suggest he could divine what would be the collective wisdom of this subcommittee—let alone the Judiciary Committee or the entire U.S. Senate. We will let the legislative process work its way as far as that particular point goes.

The bill I have introduced does focus upon a specific problem. That is the issue of court-ordered busing—lower Federal court-ordered busing—for the express purpose of achieving racial balance in the public school systems of the United States. That is the particular matter at which this legislation is directed.

The issue of busing, I repeat—and you and I know—is a very divisive issue. There are strong feelings on both sides.

This bill represents a point of view which does not think it has been a positive force in the United States—first of all, in terms of education and, second, in terms of its impact upon the black and white communities of this country.

Also, there is a feeling—and, again, I am expressing my sentiments here and to some degree perhaps they represent the feelings of others—constitutionally, the use of court-ordered busing for purposes of achieving racial balance would seem to fly in the face of the constitutional provisions of the equal protection clause and certainly of *Brown* v. *Board of Education.*

As I understand that, and as many others understand it, it means that what is required under our Constitution is that it shall be colorblind. What is required is racial neutrality.

When you begin to subtly, or not so subtly, eat away at that concept and allow race to be a consideration in State or local governmental action it does seem to a number of critics that you begin to jeopardize a very fundamental premise that has become, I think, a dominant and accepted one in American public life today—namely, that race ought not to be a consideration in governmental action.

Another thought I would like to offer on the spirit in which this bill is offered is that there is no intention here, in spite of what others may feel or think or suspect, to turn any clock back. It is not an effort to upend all of the other options and avenues for dealing with the very important and sensitive issue of civil rights of black and white Americans or any other American ethnic, religious, racial group.

I might put it this way, and again I speak for myself. I do not think it is accurate or appropriate to suggest that your acceptance of court-ordered busing for purposes of achieving racial balance is the litmus test of a sound civil rights policy in the United States. I do not think that it is. It is in that spirit that I offer S. 1647.

What this bill would do is very narrow in scope. It would withdraw the jurisdiction of the lower Federal courts to issue orders of any type requiring busing where the express purpose or only purpose is to achieve racial balance. That is the particular mischief, at least, at which it is directed.

We will get more testimony on this point tomorrow, but the Congress of the United States does have the power under article 3 of the Constitution to determine the jurisdiction of the lower Federal courts. We have the power under that article 3 to create the courts. We have the power under that article to abolish the courts. We have the power under that article to decree the extent and limit of their jurisdiction.

I would like to stress that this bill deals only with a narrow, slender part of the jurisdiction of the lower Federal courts; namely, the power to issue orders to require busing for the purpose of achieving racial balance in a school system.

It does not affect its jurisdiction in any other area to deal with the whole gamut of issues and problems affecting the civil rights of minorities under the U.S. Constitution.

Whatever defects or limitations the bill may have, and it may well have, we hope these hearings will contribute to determining that. We do feel that it has the virtue of being understandable, simple without being simplistic, and that it is directed to a specific problem—namely, the one of court-ordered busing for purposes of achieving racial balance.

A final point I would like to make in terms of giving a little perspective on the spirit in which this is offered, and then I shall cease and desist, is to put in a little broader context the problem of busing.

Certainly one of the basic premises of representative government, which is the basic symbol or concept of the American democratic tradition, is that major and sweeping and pervasive policy decisions ought to be made by the legislative branch through the deliberative process.

It has the merit of being able to have all points of view brought in to build consensus and to be able to measure an infinite variety of perspectives. It is probably the great virtue of the legislative process. I would note it is probably the most successful piece of civil rights action that has been taken in the United States since 1945.

The 1964 Civil Rights Act, I would note, is a product of the legislative body.

Those areas where we have had the greatest public alienation and antagonism have come where issues have been determined in this very difficult and sensitive area by court edict or bureaucratic edict.

I think this is true in the area of busing.

I find it inconceivable, in terms of the turmoil that this matter has caused in American public life today throughout the country, that if it could have been left to the orderly building of consensus through the deliberative process of the legislative chamber—be it either the congressional or State level—I think you would have a more satisfactory, enduring, and lasting solution to a very difficult problem because it would have facilitated the building of consensus rather than rupture and alienation and frustration. I think it has contributed, to a considerable degree, to compounding the very important matter rather than resolving it.

I do feel it appropriate that the legislature be involved in this.

At some point, in terms of court action and bureaucratic action, it became imperative that through the legislative process we would become involved. We are and I think it appropriate that we be involved and see what, if any, kind of remedy we might be able to come up with.

I thank you for your indulgence, Senator Baucus. I welcome you this morning.

STATEMENT OF SENATOR MAX BAUCUS

Senator BAUCUS. Thank you, Mr. Chairman.

I first want to apologize for my tardiness.

You are to be very highly commended for starting the hearing on time—a rare occurrence in this body. I know it was a sacrifice for you to wait for Senator Grassley and myself, and I appreciate your patience.

Senator EAST. Thank you.

Senator BAUCUS. All of us in this country place education high on our agendas.

I am certain that as we pursue this bill and examine it and try to determine the degree to which this bill is good public policy or not, we will carefully focus on the public policy goal of quality education.

I would like to read a quote from Chief Justice Warren from the *Brown* decision, which I think will serve as a helpful starting point for this hearing.

He says in the *Brown* decision, and I quote:

> Today education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate a recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities—even service in the Armed Forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.
>
> Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.

As I see it, there are two major areas of inquiry we must undertake with respect to this bill. During today's session, we will look at the suggested findings in the bill.

I think it is very important for this subcommittee to examine each of those findings as carefully as we can and to ask the witnesses probing questions to try to determine which findings are supported by the evidence, which findings are not, and which findings can never be resolved.

It has always struck me as a bit strange that we draft bills saying that Congress finds this or that, but we do not spend much time trying to find out whether these findings are accurate. I think it is important that we do so.

Second, we will look at the constitutionality of efforts on the part of Congress to restrict judicial remedies in lower Federal courts. It is obviously a very important question.

I believe that there is a limit on the degree to which Congress can limit judicial remedies. In my view, that limit is that Congress cannot restrict a remedy to the extent that a constitutional right can no longer be vindicated.

I think it is crucial that we explore whether or not this bill goes too far in prohibiting a particular remedy.

I look forward to a very interesting and, I think, constructive 2 days of hearings. I think it best if we proceed.

Thank you, Mr. Chairman.

Senator **East**. Thank you, Senator Baucus.

Gentlemen of the panel, I welcome you. I would like to, if I could, briefly introduce all four of you. Then we will let all four of you speak. Then we would like to come back and get into some questions and answers.

I caution, ourselves as well as you—sometimes we Senators violate our own ground rules—we are under some, as always around here, time constraints. We need to be out of here by 12:30 p.m. I will certainly make every effort to keep my remarks and questions as brief as I can and, of course, give equal time to Senator Baucus and others who will be coming.

As you have been asked, and I would appreciate it if you would, try to keep your oral remarks to about 10 minutes each to summarize your position. As you are well aware, your written statements will be made a part of the record at the completion of the oral presentation of the entire panel. We will have that available.

We make no pretense that we can, as Senator Baucus has very rightly suggested, resolve all of the complexities of factfinding today. What we are really groping for is some rationale for your conclusions as serious students of this. As far as the extensive consideration of the data, we can of course do that at another time and place and will do so.

I do encourage you and implore you very strongly to keep your remarks as concise as you can, consistent with making your point, and appreciate that your statements will be made a part of the record. That will allow us the time to get into some questions and answers with you, which is really the vital part for us here at the hearing.

This morning we have with us in our first panel Dr. Ralph S. Scott, Jr., professor of education, University of Northern Iowa, Cedar Falls, Iowa. He holds a Ph. D. in the School of Educational Psychology from the University of Chicago. He is the author and coauthor of 3 books and over 30 articles which have appeared in national journals of educational psychology. Dr. Scott recently completed a research synthesis on black achievement and desegregation.

We also have the pleasure of having with us this morning Dr. Herbert J. Walberg. He is from the University of Chicago and has a Ph. D. in educational psychology. He has held research appointments at the Chicago Educational Testing Service and University of Wisconsin. He has taught at Rutgers and Harvard University. He is now a research professor of education at the University of Illinois at Chicago Circle. He authored or edited 16 books and wrote 12 chapters of books edited by others, 11 technical monographs, and approximately 135 research papers on a variety of matters.

We also have Dr. Willis Hawley. He is dean of the George Peabody College for Teachers at Vanderbilt University and professor of education. He is also a professor of political science and senior research associate at Vanderbilt University. He was awarded a Ph. D. with distinction in political science at the University of California at Berkeley. He has written widely on desegregation, urban politics, and other subjects. He recently released the results of a $250,000 desegregation study financed by the Office of Civil Rights and the National Institute of Education.

Finally, we have Dr. Meyer Weinberg. Professor Weinberg is the director of the Horace Mann Bond Center for Equal Education and professor in the School of Education at the University of Massachusetts. He completed his undergraduate and graduate studies at the University of Chicago. He has authored six books, published extensively on education and desegregation, and is the editor of the magazine, Integrated Education and Research Review of Equal Education.

Gentlemen, I welcome you this morning.

Dr. Weinberg, if you will please begin.

STATEMENT OF PROF. MEYER WEINBERG, DIRECTOR, HORACE MANN BOND CENTER FOR EQUAL EDUCATION, UNIVERSITY OF MASSACHUSETTS, AMHERST, MASS.

Mr. **Weinberg**. Thank you, Mr. Chairman.

Section 2(b) of the Neighborhood School Transportation Relief Act of 1981 reaches 11 findings related to the "assignment and transportation of students." I would like to review each one from the viewpoint of whether it accords with experience in desegregated school systems as well as with research as reported in readily available sources. "The assignment and transportation of students" is here equated with busing.

Finding No. 1 declares that busing:

> Leads to greater separation of the races and ethnic groups by causing affected families to relocate their places of residence or disenroll their children from public schools.

In cities such as Memphis, white flight from mandatory desegregation was widespread. In Boston, the flight was less sweeping. In both cities, many, if not most, of those who left were already attending segregated schools and living in segregated housing. Thus, their departure did not cause greater separation. Further, in Boston, while during the first 2 years of desegregation white flight occurred, there was less separation of the races among the white and black children who remained.

In places such as Jefferson County—that is, Louisville—many of the whites who left were replaced by other whites who moved in. In large cities, such as Miami, St. Petersburg, Tampa, and others, flight was less than 4 percent. In moderate-size cities, according to Dr. Coleman in 1975, flight was negligible in most such cases.

Finding No. 2 declares that busing:

> Fails to account for the social science data indicating that racial and ethnic balance in the public elementary and secondary schools is often the result of economic and sociologic factors than past discrimination by public officials.

Federal courts in mandating busing usually cite acts of deliberate discrimination by school boards. A school system that was once deliberately segregated can expand without further deliberate efforts by school authorities. It would be difficult to find a school district with mandated busing which did not engage in deliberate segregation.

In addition, school districts often influence the very economic and sociologic factors that result in segregated housing and, in time, segregated schools. This was the case in Kalamazoo, Mich., for example.

Finding No. 3 declares that busing:

> Is not reasonably related or necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful segregation because such segregation can be eliminated without such assignment and transportation.

The primary alternative to busing is integrated neighborhoods, but housing integration has advanced little in recent years. President Ford in 1976 directed that a study of alternatives to busing be made. No alternative was reported. Voluntary desegregation is effective in limited circumstances, such as desegregating a single school, as in Richardson, Tex., or in a highly restricted scope, as in San Bernardino, Calif.; but it has not been successful in desegregating any sizable city.

Finding No. 4 declares that busing "causes significant educational, familial, and social dislocations with commensurate benefits."

Busing, as such, has only a single purpose—moving children to specific schools. What happens after the children leave the buses depends on the activity of the school and home. More times than not, the academic achievement of black children in desegregated schools is higher than that of black children in segregated schools. To the degree that such desegregation was implemented by busing, one may conclude that busing was beneficial. Again, however, it was the schooling—not the busing—that produced the growth.

As for dislocations, in the overwhelming majority of cases desegregation, whether by busing or other means, is implemented peaceably and without incident. Parental concerns about safety are usually stilled after a few days. This has been the case in large cities, such as Denver, or small ones, such as Holyoke, Mass. Even in Boston, only three of the 17 high schools experienced serious disorder and virtually none of the more numerous elementary schools.

Finding No. 5 asserts that busing "undermines community support for public educatution."

Unfortunately, community support for public education is declining, both in segregated and desegregated school districts. It would seem difficult to separate out what part belongs to desegregation or to segregation. In some desegregated communities, such as Charlotte, N.C., community support and school desegregation have grown together. In South Holland, Ill., white resentment at mandatory desegregation has led voters to reject school tax measures for over a dozen years, a certain expression of lack of support of the schools.

Desegregation court orders frequently mandate community and parental involvement in the schools. Before desegregation, such formal involvement was almost unknown. This is another form of community support for the schools.

The departure of middle-class whites and blacks from various central cities is depleting the reservoir of traditional support for public education. What responsibility desegregation bears for this is exceedingly difficult to determine. The pattern is older than desegregation, and it exists in segregated communities as well.

Finding No. 6 declares that busing "is destructive of social peace and racial harmony."

That fact that all but a handful of desegregation cases have been brought and supported by black plaintiffs suggests that racial relations in the schools affected were quite disharmonious. Also, white criticism of desegregation does not abate in the absence of busing. In communities where boundary changes, pairing, change of feeder patterns, and other nonbusing techniques are being employed, criticism by whites continues.

Finding No. 7 declares that busing "has not produced an improved quality of education."

In my comment on finding four, I indicated experience supports the conclusion that under desegregation more times than not black achievement rises. The research support is formidable. However, this is not to say that the quality of education in desegregated schools is satisfactory. For one thing, even where black achievement rises, it still lags behind that of whites. That gap must be closed. The chance for it being closed under segregation is nil. Under desegregation, there is a fighting chance that it will.

Finding No. 8 declares that busing "debilitates and disrupts the public educational system and wastes public funds and other resoures."

A number of school systems that have gone through a busing program and were then called unitary by a court have been dismissed from further court supervision. At times, this happens through court process. At other times, it happens through a settlement by the parties. There is no evidence that such systems have been through the wringer and are in any sense debilitated or disrupted. Rather there is reason to believe the opposite. In some cases, desegregation has rehabilitated the system.

It should be recalled that desegregation does not create educational problems; it uncovers them. A system that is facing up to its problems is in a better position to solve them.

The research of David Colton and colleagues at Washington University in St. Louis is producing the first really firm knowledge about the costs of desegregation. He points out that in Buffalo and Boston, among others, desegregation compelled school system managers for the first time to adopt modern accounting procedures based on computerized information. Budget planning benefited. The advent of desegregation in Cleveland revealed the abysmal state of financial management in that city's schools.

Often, according to Colton, the net cost of desegregation to a school district is minimal, or even near zero, after taking into account increased State and Federal aid and systemwide economies of school closings and the like.

Finding No. 9 declares that busing "unreasonably burdens individuals who are not responsible for the wrongs such assignment and transportation are purported to remedy."

A school district found to have acted illegally must remedy such behavior. Since racially discriminatory policies by the school district led to the artificial separation of children on the basis of race, any constitutionally acceptable remedy must end that separation. Thus, a number of children of both races will necessarily be reassigned. The burden of that reassignment must be equitably shared by all the affected children. This does not seem unreasonable.

The *Swann* ruling of 1971 already safeguards children from unreasonable burdens of busing, as these might harm the child's health, safety, or educational interest. The duration of the bus ride cannot be such as to be harmful. To my knowledge, no research or documented experience has established such harm in busing.

Just this past July, the school board-appointed Task Force for Magnet Schools recommended to the Houston, Tex., board of education that maximum one-way travel time for students be set at 60 minutes for elementary and junior high level school students and 90 minutes for high school students. These limits were not challenged by the school board or the superintendent.

Finding No. 10 declares that busing "infringes the right to racially and ethnically neutral treatment in school assignment."

The goal of desegregation is to create schools in which race does not affect the way a child is treated. Such schools cannot come into existence without the prior elimination of racial discrimination. This cannot eventuate unless children are reassigned so as to end racial discrimination.

There is, of course, no right to remain segregated by race where the 14th amendment is being violated. *Swann* approved race-conscious remedies in such cases.

The last finding, finding No. 11, declares that busing:

> Has been undertaken without any constitutional basis or authority since the Constitution of the United States does not require any right to a particular degree of racial or ethnic balance in the public schools.

The term "racial balance" was invented by lawyers during the 1960's as descriptive of efforts to create greater racial representativeness in a de facto segregated school district. The term "desegregation" was most often reserved for efforts to rectify de jure segregation. Over the past 20 years, both terms have been used interchangeably, thus confusing the original distinction.

There is no denial in finding No. 11 that the Constitution requires desegregation when the 14th amendment is breached.

In *Swann*, the Supreme Court held that States had the right to prescribe racial-balance remedies in the absence of any proof of intentional discrimination. The national government was held not to have such a right under the Constitution. States such as Illinois, Pennsylvania, and Massachusetts have, in fact, prescribed segregation even if it is of a de facto nature. This right has not been challenged successfully in any Federal court.

In summary, all the findings except for Nos. 10 and 11, which involve legal principles, allege certain consequences to follow from the adoption of busing remedies.

I have tried to square the first nine findings with the research and documented experiences known to me and find them wanting. In most cases, they are directly contradicted by research and/or experience. In others, they can neither be proven nor disproven.

All in all, they do not in my opinion seem to constitute a solid base for the making of public policy.

Following are specific citations which relate to my evaluation of the findings, which are also references to specific studies, for the most part, on both sides of the issue.

Thank you, Mr. Chairman.

Senator EAST. Thank you, Dr. Weinberg.

[The citations and references referred to above by Professor Weinberg follow:]

References to Materials Relating to the Foregoing Evaluation of the Bill's "Findings"

Finding 1

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Senator East. Dr. Hawley?

STATEMENT OF WILLIS D. HAWLEY, DEAN, PEABODY COLLEGE, VANDERBILT UNIVERSITY, NASHVILLE, TENN.

Mr. Hawley. Thank you, Mr. Chairman, for the opportunity to address the committee.

There are two goals of this testimony today. One is to show that the assumptions upon which the bill is based—one can call them findings, but I prefer to call them myths—are inaccurate, largely wrong, and at best misleading.

Second, it is to indicate that whatever our past experience has been with school desegregation, there is every reason to believe we could do a better job with it.

The conclusions upon which this testimony is based rest on some 6 or 7 years of work by several colleagues and myself—more recently, a study which reviewed some 1,200 items in written literature, papers, court cases, and intensive interviews with 170 persons throughout the country who are expert on school desegregation and represent various points of view.

MYTHS OF DESEGREGATION

Let me quickly deal with five myths of desegregation which established the basis for this committee's consideration of this action in the first place. I will turn briefly then to what we might do to improve desegregation. Finally, I will make a comment on the bill itself.

Myth No. 1 is that desegregation has not substantially reduced racial isolation. Racial isolation, however, has dramatically decreased in desegregated districts. Between 1968 and 1976, for example, the amount of racial separation between minority groups and whites decreased by 50 percent.

While white flight has occurred in some cities, the extent to which this is due to desegregation is invariably overstated. No city that has been desegregated is now more segregated than it would have been if it had not been desegregated.

Myth No. 2 is that desegregation can be achieved without busing, largely through voluntary choice.

It should be noted that no city has first decided to bus its children. Busing is always done as a last resort.

It also needs to be pointed out that a surprisingly small number of children go to school for desegregation purposes on the bus. It is something like 3 to 5 percent of the children of this country who ride the bus for desegregation purposes.

There is ample evidence in the courts from efforts by individual school districts to avoid busing that illustrates that in most cases where there is any sizable population of minority students, the possibility of voluntary desegregation, even when one uses magnet schools, is not very great.

Myth No. 3 is that desegregation undermines the capacities of schools to provide educational quality to children of all races.

There are really three bodies of evidence that speak to this point. They all add up to the same thing: Minority students do better in desegregated schools, especially if they are desegregated at early ages, and white children, at least, are not hurt.

That is a generalization. School systems are more or less successful with the problem of providing effective education, but let me speak quickly to the data.

There is a tendency to treat the data on this question as a dog fight—to look upon it as a debate between people of different points of view. That is not the way to go about it.

There are now some reliable social science studies which look systematically at large numbers of studies which come to some conclusions which I think most researchers would have to agree with.

The first of these bodies of evidence is a large set of studies, now numbering some 93 case studies, looking at the pattern of achievement effects. This evidence shows that, overall, students are 3 to 4 times more likely to experience positive benefits for desegregation than negative benefits. In some 20 percent of the cases, there seems to be a wash—that is, you cannot tell.

The important thing though is to go beyond the score card. Part of our problem in the past was to treat desegregation as a common experience. It obviously differs by community.

Most particularly, the studies are quite conclusive that if we desegregate black children at early ages, there are positive desegregation benefits with respect to academics.

More recent analyses show that this finding may also be appropriate for Hispanics.

One very important thing is that you simply cannot treat these studies as equal. Efforts to differentiate them by methodological quality, by scientific rigor, has some very important outcomes. The most important of these is that in the studies that are most rigorous and the most likely to meet the standards of scientific inquiry, 86 percent of those studies show positive results. In the weakest studies, only 35 percent show positive results.

A second set of data we can look at, and I will not go into this at great length, is national achievement data.

There is a common assumption, I think, that the trend in achievement scores which we generally conclude to have been negative is traceable to desegregation.

The best evidence we have on that is the National Assessment for Educational Progress. Those data show that in the Southeast, the only area of the country which has been substantially desegregated, the trend runs against the national trend. We see positive achievement gains for blacks and for whites, especially in lower grades—that is to say, among children who are most likely to have experienced desegregation.

Such correlation analysis does not prove that desegregation works. What it does do is rather stand on its head the common assumption that somehow the problems of education in this country are directly attributable to desegregation.

Finally, there are a whole set of studies which we call input/output studies, like the famous Coleman report. Those studies are almost to a one of the same opinion that minority children do better—in school systems which have substantial numbers of white children in them.

Myth No. 4 is that school desegregation leads to interracial conflict in schools and thus disrupts the educational process and increases racial prejudice.

I do not mean to be flip to say that one cannot have interracial conflict in segregated schools. It is inevitable that in the first stages of desegregation we will experience some conflict, but there is now a fair amount of evidence—the congressionally sponsored Safe School Study, for example—which suggests that those difficulties tend to be resolved. There are some continuing problems, and we can understand where those came from.

The important thing about all this, however, is that when schools try to do something about desegregation—that is to say, when they simply do not put kids together but try to encourage their interaction in cooperative ways—that positive race relations occur.

Unfortunately, we do not know any other way to improve race relations in this country, except getting people of different races together, especially when they are young.

The final myth that I want to point to is that school desegregation has resulted in such social conflict at the community level that it has destroyed race relations in the country.

Again, if we looked at the overall patterns of race relations in this country, one would have to conclude that things are better off than they were before we started school desegregation.

Again, this is not evidence that there is a causal relationship. The opposite assumption, upon which we often act, clearly cannot be sustained by our national experience.

There are quite a few studies of individual communities which suggest that local experience is very mixed and that it is hard to generalize. If that is of interest to this committee, I think the members of this panel could perhaps go into that further.

MAKING DESEGREGATION MORE EFFECTIVE

The second part of this testimony tries to deal with the question of whether we could do a better job. I surely do not want to be understood to argue that schools in this country are doing all they can to foster effective education, much less effective desegregated education. There is a great distance to go.

The point is that there is a lot of evidence that we are moving in those directions. I could cite you a number of communities that have finally gotten their act together and decided to get on with it.

One of the great problems of this bill is that it may reopen local agendas again and push us back to a time when we focused our attention not on quality but on social conflict.

With your permission, Mr. Chairman, I think it would be inappropriate for me, given the time limits, to read all of these things. There are something like 65 or 70 proposals to come out of this study which have to do with desegregating children at early grades, trying to deal effectively with the human relations programs that put children together in integrated settings, both in school and out, that involve parental action in schools and place responsibility on the schools to take the initiative with parents which they seldom do, that use school desegregation plans to promote housing desegregation, and that try to structure schools which will create a greater sense of intimacy.

I want to emphasize, in particular, because it is relevant to the policy options that this Congress has, the importance of the kind of in-service training and professional development that teachers have.

We have placed so much burden on schools and so much overload on them that we simply have to take the responsibility for assisting professional development. The only responsible position is to give some support to teachers and principals who are trying to do the job that ranges anywhere from promoting free enterprise to promoting race relations to promoting environmental education to health to bilingual education—you name it.

FALSE PREMISES OF THIS LEGISLATION

Finally, let me conclude by saying that this legislation holds out false promises. First, it holds out the promise that we will somehow do away with busing.

My guess is that this issue will, even if it passes the Congress, be in the courts for some time. School systems—and the evidence is already in on this—will be sitting around hoping and waiting for that day when they can go back to some other time, or, at least, people will be contending these issues in the courts.

Second, this legislation promises that we can achieve desegregation without busing. That is simply not going to happen. We will achieve some desegregation without busing, but not much.

Chief Justice Warren Burger has recently observed that desegregation without busing is not in the cards, and he is not known as a person who started out with a strong preconception to promote busing.

Finally, antibusing legislation holds out the promise that the problems of public education will go away if we pull back from desegregation. They will not. There is evidence to believe that while some school systems are defeated by the experience of school desegregation, in others they take advantage of the opportunity and they make something different out of the school systems that they have.

We could give you chapter and verse on the kinds of opportunities that in fact are taken by school systems when they confront the challenge of school desegregation.

Finally, let me just say that it seems to me that we have a credibility problem here. On the one hand, the Congress seems to be suggesting that we reduce the burden of desegregation from the public schools by this legislation at the same time that Congress is doing away with programs to promote voluntary desegregation on the one hand and to promote the educational opportunities of those children who are most at risk. I have submitted a more detailed statement on the issues I have discussed here.

Thank you, Mr. Chairman.

Senator EAST. Thank you, Dr. Hawley.

[The prepared statement and summary of Professor Hawley follow:]

PREPARED STATEMENT OF PROF. WILLIS D. HAWLEY

The False Promises of Anti-Busing Legislation

I. Introduction

Legislation to prohibit busing as a way to achieve school desegregation appears to be motivated, at least in part, by the belief that school desegregation has not been and cannot be in the best interests of children and communities. This conviction, while widely held, does not jibe with the available evidence. It is interesting to speculate about why the myths about the failure of desegregation have gained such currency, and I will turn to such theorizing at the end of this testimony.

The two goals of this testimony are (1) to show that the assumptions--I will call them myths--that undergird efforts to end school desegregation are either misleading, at best, or largely wrong and (2) to indicate that whatever our past experience has been, there are a number of things that can be done to increase the effectiveness of desegregation in terms of educational quality and equity and community response.

Evidence of the Effects of Desegregation Upon which this Testimony is Based

Most of the statements of fact presented in this paper are documented in the reports of a larger study of the past and potential effectiveness of desegregation conducted by the witness and several other researchers. This study examined some 1,200 studies, reports, commentaries, and court cases and included 175 interviews with persons with desegregation experience at local, state, and national levels. Unless otherwise noted, the evidence supporting statements of fact and recommendations for improving effectiveness are cited in the recently released reports of this extensive study. (See Hawley, et. al., 1981; Rossell, et. al., 1981; and Broh and Trent, 1981.)

II. The Mythodology of School Desegregation

Myth I: Desegregation has not substantially reduced racial isolation.

A corallary to or extension of this belief is that desegregation has induced white flight and, therefore, has actually increased racial separation.

The Extent of Segregation in Public Schools. There are two ways of looking at racial trends in desegregation. One is to consider the degree of segregation among schools in a given district using what is called an index of dissimilarity (Taueber and Wilson, 1979), which is computed by examining how close the racial mix of individual schools comes to the district-wide mix. The second approach is to focus on the amount of interracial contact in a district which is a product of both the relative desegregation among schools and the racial mix of the district (Rossell, 1978; U.S. Civil Rights Commission, 1979).

While these two measures are different in important ways, they tell roughly the same story. Taueber and Wilson (1979) show that between 1968 and 1976, segregation between minority groups and whites experienced a 50 percent decline. Almost all of this decline reflects changes in the level of segregation among black and white students. Nationwide, Hispanics and Asian and Native Americans have experienced relatively little desegregation, although in most areas they were initially less segregated than blacks. It appears that Hispanics, perhaps because of recent immigration to this country, are becoming increasingly segregated especially in certain areas of the West and Southeast (Noboa, 1980). One factor that can increase the racial isolation of Hispanics is the introduction of bilingual programs (Noboa, 1980).

The greatest progress in desegregation has been in the South where changes have been dramatic and lasting. Indeed, the South is now the least segregated section of the country as far as blacks are concerned. Hispanics are more segregated in the South than elsewhere (Noboa, 1980). While the rate of desegregation has slowed, it has not halted.

In some cities, Hispanics and blacks are less segregated from each other than before, in part because school boards have sometimes sought to avoid black-white desegregation by classifying Hispanics as white and mixing them them with blacks. But, in general, blacks and Hispanics are becoming increasingly segregated from each other (Noboa, 1980).

Not surprisingly, racial isolation has been reduced most noticeably when courts have ordered desegregation. Desegregation imposed by the Office for Civil Rights and state agencies has also reduced racial isolation substantially. In particular, state agencies in New Jersey and Pennsylvania have brought about reductions in racial isolation, especially in some smaller communities.

More recent data on patterns of racial isolation are not very complete. But courts continue to mandate desegregation in communities where the consequences of offical action in the past had left school systems segregated. At the same time, the pace of desegregation has slowed, in part because the school systems that engaged in the most obvious forms of de jure segregation are more likely to have been the target of legal action in the past.

What About White Flight? Despite the past gains in reducing racial isolation in schools, some observers assert that this ground will be lost because of desegregation-induced white flight. As the data cited above suggest, this potential reversal did not occur between 1968 and 1976, even though the late 1960's and early 1970's was the period of greatest desegregation and activity and, as we will see, most white flight occurs in the period immediately prior to the implementation of a comprehensive desegregation plan.

There is no doubt that the proportion of minority students in the public schools, especially in urban schools, has risen dramatically. But the extent to which desegregation has caused such changes in enrollment is usually overstated.

The nation is continuing to experience a long-term movement of whites to suburbia that began well before desegregation became an issue. And, differences in birth rates among whites and minorities have also contributed to changes in the racial composition of school-age populations. These two conditions, in the absence of desegregation, produce a four to eight percent annual decline in the white student population of most northern city districts. Taking the nation as a whole, there has been a decline in the white proportion of students in both public and private schools--at least through 1978.

Whites do flee from desegregation in some cases, especially when their children are bused to minority neighborhoods, and the proportion of minority students exceeds 30-35 percent.

It is important to note that the greatest amount of white flight occurs before the plan is actually implemented. This means that most people flee desegregation before they experience it.

The long term effect of desegregation on white flight is more difficult to assess from the available research. In many cases, the acceleration of white flight trends in the implementation year are followed by lower than average rates of "normal" white loss. Districts less likely to "make-up" their white loss in the implementation year are big city districts where white students are in the minority.

The long term effects of desegregation on white flight seem to depend on a number of factors, and racial composition has stabilized in some desegregated communities with minority white student populations. Most school systems do relatively little that is explicitly aimed at reducing white flight. More could be done. In particular, desegregation plans that are carefully drawn may encourage residential desegregation, thus reducing the need for busing.

The extent to which the changes in the proportion of minority students in desegregating school systems can be traced to desegregation is almost always overstated. Moreover, such flight has not yet actually reduced the amoung of interracial contact over the predesegregation situation.

Summary. Desegregation--even considering the most dramatic cases fo white flight--does not increase the separation of races in public schools. No school system for which data are now available is more segregated today than it was before desegregation was ordered.

In Boston, for example, where really substantial flight to suburban and private schools has occured, there is now two times more opportunity for interracial contact than would be the case if the schools had not been desegregated.

It seems clear that desegregation has substantially reduced racial separation among schools; there are many fewer schools today that are one race schools than was the case 10-15 years ago. But many schools that are are racially mixed end up segregrating students within schools by race. The scope of this problem is just now being realized and several strategies are available for reducing racial isolation within schools (See Cook, Eyler, and Ward, 1981).

Myth II: Desegregation Can be Achieved Without Busing and Largely Through Voluntary Choice

The legislation before Congress purports not to be against desegregation, only against busing as a way to achieve interracial schools. It may be useful, therefore, to summarize the status of busing for desegregation and what we know of its effects.

Busing and Desegregation.

1. More children ride the bus to school today in this country as a whole, than walk. The number of children who ride the bus under court order is quite small. The extent to which busing as a symbol of opposition to desegregation itself is suggested by the fact that the proportion of students in Los Angeles involved in court-ordered busing was four percent. No one knows for sure what percent of the nation's students ride the bus for desegregation purposes but the number is probably between three and five percent.
2. At the same time, busing is essential to substantially reduce the racial isolation of some schools. In Nashville, for example, a federal district court judge ordered the virtual elimination of busing in grades K-4. Even though every effort was made to integrate in the absence of busing, 63 percent of the K-4 grades had less than 10 percent of either black or white students in them in a city whose population for these grades is about 32 percent black.
3. Whether students ride the bus to school or get there on foot or by car does not seem to affect their achievement or attitudes toward school. Of course, excessively long rides, say of an hour or so each way, could well affect energy and interest in school. But few courts have required such rides. It is interesting to note that during the ten year period of 1968-1978, when most desegregation was initiated, the proportions of students being bused more than one half hour to school remained the same--about 15 percent (U.S. Bureau of the Census, 1978).
4. Carefully designed school desegregation plans appear to foster the desegregation of housing. Housing desegregation, in turn, reduces the need for busing. In Riverside, California, for example, children were initially bused to more than 20 schools for desegregation. Now children are bused to only four schools.

Can We Voluntarily Desegregate Schools? Under the best of circumstances, it appears that relatively few whites will voluntarily send their children to predominantly minority schools or to schools in minority neighborhoods. This means that where there are a few minority students in a district, voluntary choice plans may work because few whites are required to secure racial integration. In cities with more than 30 percent minority, even when magnet schools are used, some approximation of racial balance is seldom achieved without mandating pupil assignments. In districts that are more than 70 percent white, one cannot be assured that voluntary plans will work; this seems to depend on numerous factors such as the relative socioeconomic status of minorities and the extent of residential segregation.

The limits of magnet schools as a vehicle for voluntary school integration are suggested by reports that the enrollment in Los Angeles' magnet schools dropped by 50 percent when the district was freed from court order and sought to desegregate through parental choice.

Almost all school systems facing pressures to desegregate seek to do so without requiring that students be bused for that purpose. There is a very extensive record of court action documenting the relative ineffectiveness of every sort of plan based on voluntary choices by parents.

Obviously, it would be wonderful to be able to achieve desegreagtion voluntarily and without requiring busing. Such volunteerism should be encouraged even in the face of discouraging evidence. But the evidence is very strong that busing will be required in some cities if racial isolation is to be substantially reduced.

Myth III: Desegregation disrupts schools and undermines the quality of education available to students of all races.

When we speak of a school's educational quality, we usually refer to its ability to foster high academic achievement. The available evidence suggests that school desegregation, overall, enhances academic achievement for minorities and, at least, does not impede the academic progress of whites. There are three bodies of evidence that speak to this conclusion.

Case Studies. These studies examine quantitative evidence of academic achievement in schools or school systems undergoing desegregation. In 1978, Robert Crain and Rita Mahard (1978a) reviewed the studies of particular communities that have developed explicit desegregation plans. Of seventy-three studies, they found forty in which desegregation had a positive effect on black achievement, twenty-one with little or no effect, and only twelve with a negative result.* Studies of the effects of desegregation over time (more than one year) showed more positive outcomes than studies of the first year of desegregation. (See also MacQueen and Coulson, 1978, on this point.)

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*Ronald Krol (1978) independently analyzed fifty-five studies, most of which were examined by Crain and Mahard. Krol utilized a statistical technique called meta-analysis and came to basically the same conclusions as did Crain and Mahard.

A 1980 analysis of 93 case studies by Crain and Mahard (See Rossell, et. al, 1981) confirmed the positive effects of desegregation in the early years, and extended the finding to hispanics. This study also indicates that one reason that the research has provided somewhat ambiguous signals in the past is that methodologically weak studies appear to yield more negative results than strong studies. Eighty-six percent of the studies with the strongest methodology showed positive results while only 34 percent of the weakest studies did.

Results of the National Assessment of Educational Progress. It seems reasonable to assume that desegregation is seen as a major reason for the widely publicized decline in test scores over the last several years. However, not only are the overall declines in academic performance overstated in most cases, the relationship between desegregation and achievement appears to be the reverse of what many seem to believe. Roy Forbes (1981), director of the National Assessment recently compared trends in the performance of blacks and whites in the Southeast, the most thoroughly desegregated section of the country, with performance trends in other regions. This analysis showed that changes over the last several years in performance were generally more positive for southeastern youngsters, especially blacks, than for students in other regions. The most recent data on reading performance confirm the continuing progress of southeastern youngsters, both black and white. This progress is resulting, generally, in a narrowing of the historic differences in the performance of southern students and those from other regions (NAEP, 1981). (It might be noted that the assessment staff sought to determine whether these changes were attributable to migration from north to south and concluded that this was not the explanation (Forbes, 1981)).

The relative gains in achievement among southeastern youngsters is not conclusive evidence that desegregation improves achievement. But it does rather turn on its head the more common assumption that recent declines in test scores are the consequence of desegregation.

Input-Output Studies. A third source of evidence on the effects of desegregation on achievement are "input-output" studies, such as the so-called Coleman Report (1966), that correlate the racial composition and other school characteristics of the school are correlated with test scores across districts without the researchers being concerned with how or when schools came to have a particular racial mix. Bridge, Judd, and Moock (1979) have recently completed a careful assessment of the major input-output studies of minority academic achievement. They found, with one exception which dealt with students not desegregated until the junior high level, that blacks' test performance is higher in predominantly white schools. One other input-output study, by Robert Crain and Rita Mahard (1978b), examined data from the National Longitudinal Study of the high school class of 1972 and found that in the North black achievement tends to increase as the proportion of white studens in school increases. But in the South, attending predominantly white schools does not significantly affect black achievement. They suggest that the reason for this regional difference may be that the majority of the seniors tested in the Southern schools had attended segregated schools most of their lives.

Mahard and Crain (1980) examined data from the National Longitudinal Study of the high school graduating class of 1972 and found that Hispanics who attended racially mixed schools had higher achievement test scores than those who attended segregated schools when students' social background was controlled.

Conclusion. Looking at the most common types of evidence used to judge educational quality, it seems safe to conclude that desegregation enhances rather than diminishes the academic achievement of minorities, especially when children are desegregated at an early grade. Moreover, desegregation does not seem to impair, and may even facilitate, the achievement of whites. Why this is so, however, is not clear. Based on reports from observers around the country, it appears that desegregation often leads to curricular changes, more teacher training, and new programs (Boston is a notable example of this aspect of desegregation). In any case, most desegregated schools, as is true for most schools that have not been desegregated, can do more to enhance academic achievement.

Myth IV: School desegregation leads to interracial conflict in schools and thus disrupts the educational process and increases racial prejudices.

Evidence. Some interracial conflict does occur in desegregated schools, that overall levels of disruption and disorder are short-lived, and that desegregation can, with almost any significant effort to foster interracial contact by school systems, lead to improved race relations among the students involved.

Desegregated schools experience greater conflict than segregated schools when schools are first racially mixed. Some of this conflict will occur across racial lines. But desegregation does not appear to be a major cause of school violence. The massive Safe School Study (National Institute of Education, 1978) found that despite the atenttion the media have given to the violence accompanying the desegregation process,

> A school's being under court order to desegregate is associated with only a slight increase in the amount of student violence when other factors are taken into account....The statistical analysis shows further that there is no consistent association between the number of students bussed and school violence, controllng for other factors. Finally, there is a weak association between student violence and the recentness of initial desegregation efforts at a school. Together these findings suggest that some violence may be due to the initiation of mandatory desegregation, but that as time goes on and larger numbers of students are bused to achieve racial balance the desegregation process ceases to be a factor.

A reanalysis of the Safe Schools Study date by Gary Gottfredson and Denise Daiger (1979) suggests that in junior high schools where larger numbers of students are bussed to achieve racial balance, there are "slightly higher rates of student victimizations" (p. 171). It should be emphasized, however, that urban schools in general, and especially those located in poverty areas, experience higher rates of victimization and that the "contribution" desegregation makes to inter-student violence in urban junior high schools is small, "smaller than the contributions of school administrative and governance styles...." This study finds problems of interstudent violence greater only in urban junior high schools. What is apparently occurring is that the desegregation of urban junior high schools brings together students from different neighborhoods who may have different values at an age when young people are anxious about their identity, their relationships to others, and whether they will impress or be accepted by their peers. That this situation would lead to conflict among students is not surprising.

Interracial conflict in schools reflects the class and racial conflict in the communities of which they are a part. The question is: can desegregation lead to improvements in levels of interracial tolerance and redirections in discriminatory behavior. The answer is clearly that it can. Simply mixing white and nonwhite students together in schools will not result in better race relations. But, when schools adopt programs to improve race relations, the desired improvements occur, especially when: (a) cooperative interracial contact is provided for both in classroom and extracurricular activities, (b) programs are integrated with the rest of the curriculum and are continuous, and (c) school and district officials make their support for better race relations clear to teachers, students, and parents.

Myth V: School Desegregation Results in Conflict at the Community Level.

School desegregation has resulted in such social conflict at the community level that it has undermined race relations and disrupted the social peace. A corallary of this myth, which is often buttressed by pointing to white flight, is that desegregation has undermined support for public education.

In some very visible communities, the conflict over desegregation is harsh and bitter; in most it is not. Overall, while the country has desegregated, interracial attitudes and public behavior have changed in positive directions. Communities undergoing desegregation seem to accept it, often grudgingly, and to reflect no continuing patterns of interracial hostility. Indeed, interracial hostility in the South, where desegregation has been most extensive, has diminished. Christine Rossell (Rossell, et. al., 1981) has summarized what we know from national surveys, and the research on community attitudes--most of which has been conducted in school districts experiencing high levels of protest and white flight--indicates that the following propositions characterize this phase of social change:

1. The reduction in school segregation in the last decade and a half has been followed by a reduction in racial intolerance in both the North and the South.

2. Over time, there appears to be no backlash against the principle of racial integration despite racial confrontations and controversy surrounding school desegregation.

3. The prominence of "busing" as a problem begins to fade by the end of the first year of the implementation of a school desegregation plan.

4. Although there is increasing support for the principle of racial integration and racially balanced schools, whites are overwhelmingly opposed to busing for racial desegregation of the schools.

5. Both blacks and whites generally overestimate their neighbors' opposition to racial balance in the public schools, and this is important because adult attitudes are influenced by their neighborhood attitudinal context.

6. In desegregated school systems, parents who have some children attending public school are more likely to intend to enroll their preschool children in the public schools than those whose children are all preschool age. In Boston, residents with school age children in areas affected by the first phase of desegregation were more likely to have a favorable evaluation of desegregation than those without school age children.

7. While a few studies show increased prejudice after desegregation, most show no difference or more positive attitudes. None of the studies has been conducted later than the second year of desegregation and most are in school districts which experienced violence and controversy.

8. Parents in school districts which experienced violence and controversy continue to have strong fears regarding the quality of education in desegregated schools.

9. In Louisville, most whites feel their relations with blacks are friendly or neutral despite the controversy over desegregation.

10. Both community and parental opinions have a strong influence on children's attitudes toward specific desegregation issues.

III. Increasing the Effectiveness of Desegregated Schools: Promising Strategies

Overview

That the most commonly held myths about the failure of desegregation are not supported by the evidence does not mean that desegregation has been an unqualified success. Clearly, its achievements have fallen far short of the hope of its advocates.

Some school systems have been more successful than others in meeting the challenges and seizing the opportunities posed by desegregation. No school system is doing all it can to make school desegregation work most effectively. Given the substantial resistance by some parents and the general lack of commitment among many educators to desegregation, it is surprising that the evidence on its overall effects on children are relatively positive. It follows that if we are not doing all we can, we can do better.

As noted earlier, my colleagues and I, who come from nine universities, the Rand Corporation and the Education Commission of the States, have just completed a study, the purpose of which has been to identify things school systems can do that will increase the probabilities that they will desegregate effectively. This study has yielded numerous proposals and I will briefly describe them below. That there are policies and practices that can enhance the potential benefits and reduce the potential costs of desegregation seems reason not to retreat.

The different sources of information used in this project, taken together, represent the most extensive evidence on the effectiveness of desegregation strategies yet collected. Members of the project team sought to develop practical advice on how to more effectively desegregate public schools. The specific proposals, however, should not be thought of as hard and fast propositions that will work in all circumstances. Educators, judges and policy makers will need to adapt most of these ideas to local conditions if the proposals derived from this inquiry are to produce maximum benefits for students and communities.

In reaching its conclusions, the study team has relied most heavily on social science research whenever the quality of that inquiry allowed. In many cases, however, the evidence needed to answer policy issues faced by those who develop and implement desegregation policies and programs is missing or mixed. We have found expert opinion to be extraordinarily helpful in clarifying these uncertainties. There is, moreover, remarkable agreement among the desegregation experts, both local and national, who offered opinions about the effectiveness of particular strategies.

The findings of this study are related to four key steps in securing effective desegregation. The essential first step in desegregation is the design of the pupil reassignment plan to reduce racial isolation and, to the extent possible, achieve or set the stage for achieving other goals of desegregation. A second step is to encourage the desegregation of housing so as to minimize the need for pupil reassignment. Third, the effectiveness of desegregation depends importantly on the development of strategies to involve and prepare and inform the community, and especially parents, so as to build support for and promote compliance with the goals of the desegregation plan.

In addition, school desegregation invariably requires changes in the things schools do. Simply reducing isolation and heading off conflict will not be enough to achieve effective desegregation. Thus, desegregating school systems need to implement strategies relating to (1) the organization of school systems at the district level to provide continuing support for desegregation, (2) structural and curricular changes within schools, and (3) more effective inservice training for teachers and administrators.

Pupil Assignment Plans

The primary objective of a pupil assignment plan is to reduce or eliminate racial isolation in schools. The development of a reassignment plan requires that several considerations be taken into account, including the race, ethnicity and socioeconomic class of the students reassigned, the former racial composition and neighborhood of the schools they are reassigned to, the grades during which they are reassigned, the character and continuity of educational programs, and the distance and costs of transportation. The student reassignment process has political and economic implications, as well as important social and educational consequences that judges, lawyers and school administrators should consider.

Considerations that should be taken into account in developing pupil assignment plans are:

- Desegregation that begins at the earliest possible grade will advance achievement and race relations.

- Voluntary desegregation, including plans relying on magnet schools, is not an effective strategy in reducing racial isolation except in districts with small proportions of minority enrollment.

- Mandatory student reassignment plans are an effective way to reduce racial isolation even though they result in greater white flight than do voluntary plans. When pairing or clustering schools for pupil assignment purposes, such linking should take into account the special needs of national origin minority (NOM) students for language and cultural reinforcement programs.

- There is no empirical evidence that one-way busing plans are harmful to minority students. Two-way busing plans, especially when they involve young children, will lead to substantially more white flight from desegregation than will one-way plans. Mandatory black reassignments, whether in one-way or two-way plans, do not provoke black flight and black protest, relatively speaking, even when blacks disproportionately bear the burden of busing. The experts we interviewed generally advocated two-way plans because of equity considerations, the long-term support desegregation will have from minority communities and the possibility that this will facilitate housing desegregation.

- Enriching the curriculum in all schools and offering college preparatory courses in all secondary schools rather than providing alternative academic magnet schools, seems likely to keep parents with high academic aspirations for their children in the public school system, to avoid resegregation among schools, and to foster educational opportunities for all students.

- Magnet schools used as a part of a mandatory plan can both reduce flight and racial isolation. An unintended consequence of instituting magnet schools may be to stigmatize the non-magnet schools as inferior.

- Since busing is a symbol on which the community focuses, if pupil assignment and transportation processes are conducted efficiently and smoothly, parents may tend to have more confidence in the ability of the school administration to handle other aspects of the desegregation process. Where appropriate, bilingual, bicultural personnel should be assigned to school buses and sites to avoid confusion and clarify instructions. As a result, there may be less white flight and a better climate of opinion in the community.

- Subdividing the school district into smaller racially balanced districts and permitting reassignment only within these districts reduces options for achieving racial balance.

- Phased-in plans tend to produce more white flight.

- Stability of teacher-student/student-student relationships seems likely to increase enrollment stability, reduce student anxiety and foster better race relations.

- The deteriorated physical condition of schools contributes to parent reluctance to have their children reassigned to them.

- In areas where desegregation will not occur in the immediate future, a program of voluntary metropolitan student transfer can be effective. Voluntary metropolitan programs cannot be considered adequate substitutes for desegregation programs, since they invariably leave most minority schools nearly as segregated as before.

- Metropolitan plans are effective strategies for reducing racial and class isolation.

- Blacks, Hispanics, Asians/Pacific Islanders, and Native Americans are discrete groups and the educational needs of different subgroups within these groups are also often different.

- A "critical mass" of between 15-20% of any particular racial or ethnic group in a school seems to facilitate achievement of the minority and better race relations. In biracial/bi-ethnic situations, intergroup conflict may be greatest when the two groups are about equal in size. This potential for conflict may be greatest when the students involved are of lower socioeconomic status.

- White parents, and perhaps middle class minority parents, are more likely to leave or not enter the public schools if their children are bused (a) to schools in which their students are in the minority, especially in biracial/bi-ethnic situations, or (b) to schools in minority neighborhoods. Other things equal, the higher the socioeconomic status of whites, the more likely they are to flee from desegregation to suburban or private schools.

- The maintenance of a critical mass of students who do relatively well academically seems to contribute not only to the achievement of these students but to students who have been lower achievers.

- While all experts agree that busing distances should be kept "as short as possible," there is little evidence that riding the bus, at least for the time periods required in most plans, has a negative impact on students.

Using School Desegregation to Effect Housing Desegregation

It has long been known that housing segregation can segregate schools, and it has been contended in various court suits that the reverse is also true--segregated schools create housing segregation. Now there is some evidence which indicates that school desegregation can promote housing desegregation. This can happen for three reasons. First, when a school district is desegregated there is no pressure for whites with young children to move out of racially mixed neighborhoods since the school administration has guaranteed racial stability. Secondly, any family, white or minority, can move anywhere in the school district knowing that their child will not be the only one of his or her race in the school. Third, school desegregation makes racial steering by real estate agents more difficult since they can no longer use the neighborhood school as a guide to the neighborhood's prestige, nor can they intimidate whites by arguing that certain neighborhoods have schools of inferior quality based on racial composition. Some strategies which seem to promote desegregated housing are:

- Pupil assignment plans can be designed so as to preserve integrated and racially changing neighborhoods.
- Plans that provide incentives to segregated neighborhoods to desegregate.
- Plans can provide incentives to encourage individuals to move into communities predominantly of the opposite race.
- The inclusion within school desegregation plans of a school district office concerned with eliminating housing segregation seems likely to be of benefit.
- Local housing agencies can encourage scattered site housing.
- School desegregation plans that involve local and federal housing agencies are likely to have greater impact on housing.

Community Preparation and Involvement

Between the time the court order comes down and the time school desegregation is actually implemented, the school district has an opportunity to prepare parents and the community for desegregation to ensure that it will be implemented smoothly and work well. In most cases this opportunity is not well used.

The fears of parents of violence in the schools, of the unknown, and of losing control of their children's lives have important effects on their behavior and, ultimately, on the outcomes of desegregation. The school district and the political and business leadership need to deal with these anxieties if desegregation is to be successful. Yet, often the school district provides parents and community groups little involvement, the mass media exacerbates their fears by covering white flight and protest, and the business and political leadership remain silent.

Post-implementation parental involvement in the schools may ultimately be as important as pre-desegregation involvement if it gives parents the feeling that they have some control over their children's education and their future. Many administrators and teachers, however, see education as a professional matter in which laymen should not intervene. When the context is a highly charged political issue such as school desegregation, that kind of attitude may only create more problems for the school district. Some strategies for community preparation and involvement that appear to be effective include:

- In presenting their views to the community, proponents of desegregation should emphasize the educational programs that will be available as a result of the court order or school board action.
- The school system should take the responsibility for providing newspapers and television with positive stories on desegregation and evidence on school performance, both before and after desegregation, and with press releases about new and innovative school programs. This is a full-time job which requires someone skilled in public information and marketing.
- Parents should be provided with clear and full information about the desegregation plan and its implementation.
- Local and neighborhood leaders should be encouraged to play a more positive role in desegregation controversies. This can be an effective strategy for influencing positive public reaction to desegregation. Leaders of the same race, ethnicity and religion as the persons they hope to influence will be most effective.
- Community preparation before desegregation should include the maximum number of parent visits to other-race schools.
- School systems should maintain contacts with parents who have withdrawn their children from public schools.

Organizing at the District Level for Continuing Implementation

How districts should organize so as to best promote desegregation receives little attention despite some recognition by experts that this can make or break the implementation of the plan. If no effort is made to establish a capability at the district for fostering effective desegregation, it is unlikely that the opportunities created by desegregation will be realized, or that the problems it introduces will be dealt with adequately. Ways of organizing the district to implement desegregation may reinforce propensities to see desegregation as something apart from the central functions and activities of the district. This in turn may lead to failures to adapt to desegregation and to coordinate the full resources of the district in ways that break down the false dichotomy between educational equity and educational quality.

School districts should establish a small, professionally staffed unit in the superintendent's office with the responsibility to enhance the motivation and capability of the operating agencies that administer the central functions of the district.

Mechanisms for monitoring compliance and effective implementation should be established.

Teachers and principals should be involved in the development of desegregation-related policies.

The public information function should be strengthened.

Program evaluation capabilities should be strengthened.

Structural and Curricular Changes in Desegregated Schools

Because school desegregation is often preceded by years of litigation and controversy about the creation of racially or ethnically mixed schools, it is all too easy to think of desegregation in its narrowest sense and to assume that once racially mixed schools have been set up, the desegregation process is complete. However, it is important to recognize that it is precisely at this point in the desegregation process that interracial schooling *begins* for the student and that the nature of students' experiences is crucial to their academic and social development. Policies and practices that there is reason to believe will help to create school and classroom environments that will foster academic achievement and more positive intergroup relations, and will avoid resegregation include the following:

- Maintain smaller schools.
- Maintain smaller classrooms.
- Reorganize large schools to create smaller, more supportive learning environments.
- Desegregated schools should have desegregated staffs.
- Employ minority counselors in desegregated high schools.
- Employ an instructional resources coordinator in each school.
- Desegregated schools should utilize multiethnic curricula.
- Desegregated schools should maximize parental involvement in the education of their children.
- Desegregating schools should develop a comprehensive student human relations program.

- Opportunities for cooperative learning, including the use of student teams, should be provided in desegregated schools.
- Peer tutoring can be a strategy for dealing with achievement diversity.
- Eliminate the grouping of students in separate classes by ability in elementary school.
- Examine carefully any within-classroom ability groups that do not change.
- Eliminate rigid and inflexible tracking and grouping in secondary schools.
- School officials, staff and teachers should receive training in and develop explicit policies and procedures for identifying and placing students in special curriculum in non-discriminatory ways.
- Establish clear and consistent expectations for student behavior in each school.
- Analyze carefully the reasons for disproportionate minority suspensions.
- Limit the number of offenses for which suspension and expulsion can be used.
- Create alternative in-school programs in lieu of suspensions.
- Desegregated secondary schools should ensure desegregated student governments.
- Desegregated secondary schools should have a student human relations committee.
- Maximize opportunities for student participation in integrated extracurricular activities.
- Establish multiethnic in-school parent and teacher committees to provide counseling and to handle grievances of parents, teachers and students.

Strategies for Inservice Training

School desegregation presents most educators with new experiences which challenge their professional capabilities and their personal values and dispositions. Almost all desegregation plans or programs provide for some type of inservice training. In addition, most experts agree that inservice training is necessary to prepare educators for changes in schools that result from desegregation.

Despite such agreement and exhortation, educators frequently express skepticism about the usefulness of inservice training for desegregation. Indeed, such doubt regarding the effectiveness of widespread and often uncritically planned and implemented inservice programs may be well founded.

The usefulness of inservice training in any school setting depends on at least four factors: 1) the manner in which training is conducted, 2) the content of training, 3) what groups participate in the training programs, and 4) who conducts such training. Effective strategies for inservice education in desegregated schools include:

- Faculty members, administrators, and non-professional staff should understand the desegregation order, the desegregation plan, and the implications of the plan's implementation to the district, individual schools, and inservice participants.

- Topics of inservice training programs should be germane to individual participants, their needs and day-to-day problems. Program development should be predicated on a needs assessment conducted by school staff. Programs that aim for long-range changes need follow-up components which focus on individual problems of participants applying training in the classroom. Classroom implementation of training should be monitored and follow-up sessions should be planned to assist participants.

- The specific content of inservice training should be oriented toward school-level and not district-wide concerns. Small group formats are better than larger multi-school formats because they allow for identification of and concentration on problems of individual participants in single school settings.

- Training should be practical with "hands-on" experience and product-oriented outcomes for immediate application. There is consensus that abstract, theoretically oriented training programs offer little immediate assistance to teachers and administrators and, as a result, participants tend to view such programs as providing slight, if any, benefit.

- Participants should be included in the planning and design of inservice training programs.

- If trainers are brought in from outside the school system, they need knowledge of district and single school matters. Teachers and principals often respond better to peers from their own and other schools than they do to professional consultants.

- Whenever possible, faculty and staff of host schools should be involved in the conduct of inservice training.

- All members of groups being trained should participate. Ideally, training should be perceived by educators as important enough to warrant full participation. Realistically, incentives should be provided for total participation in inservice training. Financial rewards, course credit, or certificate-renewal credit might be offered. If strategies for voluntary participation fail, training should be mandatory.

- Inservice training should be incorporated as a component of total school or district functions. Desegregation-related training should be tied to central concerns of educators such as enhancing achievement and classroom management.

- Training programs should be continuous. Simply providing workshops before schools open or infrequent training sessions is not likely to have much effect.
- Little attempt should be made to directly change attitudes of participants. Preaching is ineffective and often dysfunctional to program goals.
- Program goals should be well established and communicated to participants before training begins.
- Programs on different topics should be coordinated and linkages between training areas should be established to provide continuity.
- Teachers and administrators should participate in programs together since they can reinforce each other to implement what is learned through training programs. Furthermore, teachers and administrators need to develop school-level norms that foster more effective desegregation-related practices.

These recommendations focus on the processes that contribute to effective inservice training of educators regardless of the specific substance of the material being learned. The topics of training which appear to be most important to effective desegregation are:

- Instructional methods for dealing with heterogeneous groups of students
- Curricula development
- Self-awareness, empathy and interpersonal relations
- Discipline and classroom management
- Parental involvement
- Strategies for effective administration at the school and district level.

Final Comments

The strategies identified here carry no guarantees. School desegregation, like any other educational policy, depends fundamentally for its success on the commitment and capability of school personnel and the support of those on whom schools most depend, especially parents.

If we had more research focused on the relative effectiveness of different desegregation strategies, educators, parents, judges and policy makers could act with greater certainty. As important as empirical research is the development of ways for educators and parents from different communities to learn about the specific experiences of other communities undergoing desegregation.

This study was not designed to discover whether desegregation invariably benefits students and communities. It does, however, provide a basis for challenging claims that desegregation does not and cannot result in effective education. School desegregation clearly complicates the jobs of teachers and administrators. But, it usually creates greater equality of educational opportunity and often encourages school systems to change to meet their responsibilities to all students. The rather broad range of effective desegregation strategies identified in this study suggest that there is no necessary tradeoff between equity and quality in most American schools. This research, we believe, provides the basis of the development and implementation of policies and practices that will enhance the probabilities that desegregation will benefit children of different races, ethnicities and socioeconomic backgrounds.

IV. Conclusion

How negative or positive one views the evidence on the social and educational consequences of desegregation will depend on one's predispositions and priorities. But it seems safe to say that the available empirical evidence is substantially more positive than the public believes it to be and conflicts dramatically with the "findings" justifying legislation to prohibit busing for purposes of desegregation.

How can this gap between evidence and belief be so great? One possibility is, of course, that the data do not capture important aspects of our national experience. This is probably true but it could be that more and better data would provide a better report card for desegregation. Indeed, it does appear--for understandably scientific reasons--that the weaker research has been the less positive in its findings.

Let me suggest, very briefly, six other reasons why we may have a destorted view of what desegregation has wrought and what the prospects are for more positive outcomes in the future.

- People are more aware of what is going on in schools. Normally, most parents know very little about the experiences their children have at school. To allow oneself to be uninvolved may require the assumption that the school one's child attends is a good one. When desegregation occurs, parents ask questions they did not ask before and they compare the answers to their fantasy. Even if the school improved after desegregatin, it would not meet the standards parents feel they knew existed before desegregation.

- Desegregation raises expectations. Not only do parents pay more attention to what goes on in desegregating schools, they probably expect more than they did before desegregation. Desegregation requires change and change presents risks, potential gains and potential losses. Some whites, for example, may assume that the education minorities have received is inadequate. They may insist, therefore, that schools be better after desegregation than before when the efforts of minority peers on the curriculum and on learning might be expected to be negative.

- If the evidence about school quality is mixed, parents may see it as negative. A parent concerned about their child's welfare can be very cautious. Bad evidence is believed, positive evidence is discounted. That is a responsible parental predisposition. Isolated incidents or weakness of individual teachers are risks parents may not want their children to have any probability of experiencing. Thus, negative stories dominate parental consciousness.

- Some persons assume that minority schools are unlikely to be good schools. A related belief is that minority students, in general, are unlikely to be good students. These assumptions lead to conclusions that desegregation must, inevitably must reduce the quality of education in the public schools.

- The media often focus on problems and thus distorts reality. Problems are news, achievements are human interest stories. Analyses of press coverage during the initial stages of desegregation show that the press and television generally focuses on difficulties rather than on positive developments. "The study" is conflict.

- The problems of schools may be generalized to desegregation rather than to other events. Schools have been at the cutting edge of social change for the last decade. Hosts of new demands have been placed on them and resulting in overload in many cases. School desegregation is a lightening rod for other concerns. When we see complexity, we want simple answers. The idea that we could cure the perceived problems of public education by backing away from desegregation is understandably attractive.

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Anti-busing legislation is, at best, a distraction. The business of providing better education for young Americans needs to proceed. Rather than induce stability, this legislation is likely to reopen old wounds and reorder agendas.

The proposed legislation holds out false promises. First, that busing will end in the near future. It will not. This legislation will be tested in the courts for many months. Second, this legislation promises that we can achieve desegregation without busing. But we cannot, at least in many cities. Where we can desegregate voluntarily, all the better. Almost all school systems try to desegregate voluntarily as a first step, and courts and state agencies regularly find that these efforts do not often succeed. Busing is always the last resort in desegregation plans. Further, anti-busing legislation holds out the promise that the problems of public education will go away if desegregation goes away. But never before have schools been racially separate and educationally equal and so long as racial discrimination and inequality exist, it is unlikely that they will ever be.

For the congress to impede strategies to improve equity and quality on the one hand on the assumption that this will lift a burden from the public schools, and, on the other hand, to withdraw financial support from children and school systems most in need, and eliminate incentives for voluntary desegregation, is the kind of political message that can only further test the public's faith in government.

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SUMMARY OF STATEMENT OF PROF. WILLIS D. HAWLEY

The False Promises of Anti-Busing Legislation

The two goals of this testimony are (1) to show that the assumptions--I will call them myths--that undergird efforts to end school desegregation are either misleading, at best, or largely wrong and (2) to indicate that whatever our past experience has been, there are a number of things that can be done to increase the effectiveness of desegregation in terms of educational quality and equity and community response.

These conclusions are based on a long-term effort by several prominent researchers to understand and synthesize the available evidence on the effectiveness of school desegregation. In particular, it draws on a recent analysis of more than 1,200 studies, reports, books, articles, papers, and court cases and intensive interviews with 170 persons with experience and expertise in desegregation.

The Mythology of School Desegregation

Myth I: Desegregation has not substantially reduced racial isolation. A corallary to or extension of this belief is that desegregation has induced white flight and, therefore, has actually increased racial separation.

Evidence. Racial isolation has decreased dramatically in desegregated districts. Between 1968-1976, for example, desegregation between minority groups and blacks decreased by 50 percent. While white flight has occurred in some cities, the extent to which this is due to desegregation is invariably overstated. No city that has been desegregated is now more segregated than it was before desegregation. Boston, for example, where massive white flight occurred, has twice the amount of interracial contact than it would have had absent desegregation.

Myth II: Desegregation Can be Achieved Without Busing and Largely Through Voluntary Choice

Evidence. While the amount of busing required to achieve desegregation is surprisingly small nationwide (estimates are that 3-5 percent of children are involved), it is nonetheless essential in some communities. This is especially true in central cities.

In Nashville, for example, a federal district court judge recently ordered the virtual elimination of busing in grades K-4. Even though every effort was made to integrate in the absence of busing, 63 percent of the K-4 grades had less than 10 percent of either black or white students in them in a city whose population for these grades is about 32 percent black.

Whether students ride the bus to school or get there on foot or by car does not seem to affect their achievement or attitudes toward school. Of course, excessively long rides, say of an hour or so each way, could well affect energy and interest in school. But few courts have required such rides. It is interesting to note that during the ten year period of 1968-1978, when most desegregation was initiated, the proportions of students being bused more than one half hour to school remained the same--about 15 percent.

Voluntary desegregation may achieve adequate reductions in racial isolation where the proportion of minority students is small. In cities where the proportion minority approaches or exceeds 30 percent, substantial desegregation is not likely, even where magnet schools are extensively used.

Myth III: Desegregation undermines the capacity of schools to provide a quality education to children of all races.

Evidence. Analyses of numerous stuides of desegregated schools show that when children are desegregated at early grades, the academic achievement of minorities is enhanced and that of whites, at least, is not harmed. A common assumption is that desegregation has contributed to the widely proclaimed decline in test scores nationally. But, youngsters from the southeast, clearly the most desegregated region, have shown increases in test scores compared to the students in more segregated regions.

Myth IV: School desegregation leads to interracial conflict in schools and thus disrupts the educational process and increases racial prejudices.

Evidence. Some interracial conflict does occur in desegregated schools, that overall levels of disruption and disorder are short-lived, and that desegregation can, with almost any significant effort to foster interracial contact by school systems, lead to improved race relations among the students involved.

Interracial conflict in schools reflects the class and racial conflict in the communities of which they are a part. The question is: can desegregation lead to improvements in levels of interracial tolerance and reductions in discriminatory behavior. The answer is clearly that it can.

Myth V: School desegregation has resulted in such social conflict at the community level that it has undermined race relations and disrupted the social peace.

Evidence. In some very visible communities, the conflict over desegregation is harsh and bitter; in most it is not. Overall, while the country has desegregated, interracial attitudes and public behavior have changed in positive directions. Communities undergoing desegregation seem to accept it often grudgingly, and to reflect no continuing patterns of interracial hostility.

III. Increasing the Effectiveness of Desegregated Schools: Promising Strategies

Overview

That the most commonly held myths about the failure of desegregation are not supported by the evidence does not mean that desegregation has been an unqualified success. Clearly, its achievements have fallen far short of the hope of its advocates.

As noted earlier, my colleagues and I, who come from nine universities, the Rand Corporatin and the Education Commission of the States, have just completed a study, the purpose of which has been to identify things school systems can do that will increase the probabilities that they will desegregate effectively. This study has yielded numerous proposals and I will briefly describe some of them below. That there are policies and practices that can enhance the potential benefits and reduce the potential costs of desegregation seems reason not to retreat.

Our study describes dozens of things school systems can do to promote more effective school desegregation. Among the findings are:

- Desegregation should begin at the earliest possible grades.

- Voluntary desegregation including the use of magnet schools is not an effective strategy for reducing racial isolation, except in districts with small proportions of minority enrollment.

- When magnet schools are part of a mandatory plan they can effectively attract students to desegregated settings.

- Experts generally advocate two-way busing over one-way busing because of equity and the long-term support for desegregation they will produce from minority communities. There is not evidence that one-way busing is harmful to minority students, but there is evidence that two-way busing plans, especially when they involve young children being bused into minority neighborhoods, will lead to more white flight from desegregation.

- A critical mass of 15 to 20 percent of any race should be sustained in each school, if possible, especially when the minority race students are of lower socioeconomic status.

- A plan of phasing in desegregation in stages tends to produce more white flight.

- Metropolitan plans, which include the central city and surrounding suburbs, produce less white flight than central city plans.

- The educational needs of non-black minorities should be considered in the design of desegregation plans.

- School desegregation can promote housing desegregation. The right kind of desegregation plan can create incentives for voluntary residential integration. Reducing housing segregation reduces the need for busing.

- Between the time the court order comes down and the time school desegregation is implemented, the school district should prepare parents and the community for desegregation by addressing the anxieties of parents and community groups. The news media usually exacerbates fears by covering white flight and protest.

- Parents should be involved in the schools both before and after implementation of desegregation plans.

- Active support of school desegregation plans by neighborhood leaders can be more effective in minimizing negative reactions than endorsements from community-wide leaders.

- College preparatory courses should be offered in all high schools; magnet schools for the academically gifted should be avoided.

- Various types of human relations programs can produce better race relations but significant change requires cooperative interracial contact.

- School districts should eliminate tracking and the rigid ability grouping of students as these assignment practices tend to segregate students by race. Any within-classroom groups that do not change should be examined carefully. Special education classes should be transitional, if possible.

- A plan for ensuring school discipline is crucial and should provide for clear rules that are enforced firmly, consistently, and equitably, and for due process for those disciplined.

- In considering the size of schools, their internal structure, and the nature of the curriculum, priority should be given to the importance of settings in which teachers know students well and student-student anonymity is unlikely.

- Interracial extracurricular activities can play a significant role in enhancing race relations and community acceptance.

- Desegregation plans should include on-going inservice training programs that are designed in large part by the trainees and which treat desegregation as an integral part of the educational program.

These and the other strategies we identified carry no guarantees. School desegregation, like any other educational policy, depends for its success on the commitment and capability of school personnel and the support of those on whom schools most depend, especially parents. School desegregation clearly complicates the jobs of teachers and administrators. At the same time it usually creates greater equality of educational opportunity and often encourages school systems to change to meet their responsibilities to all students.

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Anti-busing legislation is, at best, a distraction. The business of providing better education for young Americans needs to proceed. Rather than induce stability, this legislation is likely to reopen old wounds and reorder agendas.

The proposed legislation holds out false promises. First, that busing will end in the near future. It will not. This legislation will be tested in the courts for many months. Second, this legislation promises that we can achieve desegregation without busing. But we cannot, at least in many cities. Where we can desegregate voluntarily, all the better. Almost all school systems try to desegregate voluntarily as a first step, and courts and state agencies regularly find that these efforts do not often succeed. Busing is always the last resort in desegregation plans. Further, anti-busing legislation holds out the promise that the problems of public education will go away if desegregation goes away. But never before have schools been racially separate and educationally equal and so long as racial discrimination and inequality exist, it is unlikely that they will ever be.

For the congress to impede strategies to improve equity and quality on the one hand on the assumption that this will lift a burden from the public schools, and, on the other hand, to withdraw financial support from children and school systems most in need, and eliminate incentives for voluntary desegregation, is the kind of political message that can only further test the public's faith in government.

Senator EAST. Dr. Walberg?

STATEMENT OF HERBERT J. WALBERG, PROFESSOR OF EDUCATION, UNIVERSITY OF ILLINOIS, CHICAGO

Mr. WALBERG. Thank you for the honor of inviting me to testify at these important hearings.

Since 1975, my colleagues and I have been analyzing the many hundreds of educational, psychological, and sociological studies on the factors that promote the effectiveness or productivity of education—that is, that lead to higher levels of student learning. This learning includes knowledge, understanding, and critical thinking, as well as constructive attitudes, behavior, and other goals of schools.

Most of the research is concentrated on achievement in reading, writing, mathematics, science, and social studies as measured on nationally standardized tests. The main question we have addressed is: What can be done to improve school learning for all children, ranging in grade level from kindergarten through high school?

In answer to these questions and with respect to the subject of these hearings, the available research shows that:

No. 1, a number of factors in the classroom, school, and home, such as the amount of time for study, the competencies of the teacher, and parental support of children's schoolwork, have proven very consistently associated with higher levels of student learning.

No. 2, busing for purposes of school desegregation has not proven significantly helpful on average to the learning of either majority group or minority students.

About 40 or 45 percent of the studies of busing for the purposes of desegregation show detrimental, mixed, or statistically insignificant effects of such busing. In these and other cases, busing programs may have diverted financial resources as well as the time and energies of educators, parents, and students away from proven productive factors in learning or actually interfered with the operation of these factors.

In the rest of my oral testimony, I will summarize the research on which these conclusions are based.

In compiling the results of research on productive factors in school learning, my colleagues and I have attempted to find all published and unpublished works on the topic rather than risk the bias inherent in selecting studies, such as those of only certain subjects, grade levels, or types of children, those done in certain communities or parts of the country, or those that have employed only certain research methods.

The most convenient way to summarize the research is shown in table 1 of the submitted testimony, although certainly more complex methods are described in the references which I have also provided.

[Table 1 referred to above follows:]

TABLE 1.—SELECTED FACTORS THAT ARE PRODUCTIVE OF LEARNING

Factor	Number of positive studies or results	Total number of studies or results	Percent positive
Amount of study	24	25	96
Systematic curricula	44	45	98
Mastery programs	29	30	97
Teacher qualities	50	57	88
School and class morale	620	732	85
Home support	86	86	100
Home teaching	16	17	94

All the studies of the factor are assembled and the results are counted. Then the numbers of studies or results that show a positive relation or association with learning are counted, and the percentage of all the results that are positive is calculated.

The results of the first factor, for example, show that out of 25 studies 24, or 96 percent, indicate a positive association between the amount of time spent on study and the amount that the student learns. Whether measured by minutes of study, percentage of time concentrating on the lesson, or years of education, the positive association is nearly always found under all circumstances.

Similarly, students using systematic courses—those that have modern subject matter, good instructional design, and attractive presentation features—nearly always outperform those using older courses on modern tests.

The modern high school science and mathematics courses sponsored by the National Science Foundation during the 1960's are outstanding examples of such systematic courses.

Research shows that mastery learning programs are superior to conventional teaching in 97 percent of the comparisons. Mastery programs emphasize clear goals and procedures for what is to be learned, specific instructional objectives, breaking the subject matter down into small units for study, corrective feedback to students on their progress, flexible learning time to give students the amount of time required for mastery, alternative modes of instruction, and cooperative learning with fellow students.

Research also shows that certain qualities of teachers are nearly always found to be associated with enhanced learning. Teachers who are clear in their expectations, businesslike, enthusiastic, flexible, and those who avoid excessive negative criticism bring about greater student learning than do other teachers in most instances.

In addition, the social-psychological morale or climate of the classroom and school are also consistently related to the amount students learn. When the students perceive the educational unit—the classroom or the school—as friendly, satisfying, and democratic and without friction, cliques, favoritism, and disorganization, more learning generally takes place.

The amount of intellectual and academic stimulation parents give their children in the home is also positively associated with school achievement in all studies that have been made. Parents who stimulate their children to learn new vocabulary and concepts, inform themselves about their children's schoolwork, take them to museums, encourage them to read, restrict television viewing, and the like benefit their children's learning.

In addition, programs for parental cooperative teaching and specific reinforcement of school lessons in the home, often in inner-city neighborhoods, have proven beneficial in 16 out of 17 studies, as indicated in the table.

In contrast to research on these factors in which the results and most knowledgeable educational researchers substantially agree, research on the effect of school desegregation is mired in controversy, confusion, and inconsistency as the following brief chronicle of the major points in the 15-year-old continuing debate on scholars shows:

One, the 1964 Civil Rights Act provided that a survey was to be made of the equality educational opportunity. The nationwide survey of 560,000 students, commonly referred to as the Coleman Report—after the first author, James Coleman, then of Johns Hopkins University-concluded that there are small positive benefits of desegregation on black achievement.

Black achievement, however, was higher most often, the report noted, in segregated schools than in schools in which whites comprise less than half the student population. Coleman later denied the validity of the conclusion on positive effects.

Two, in 1972, however, Fred Mosteller and Patrick Moynihan edited a book containing further analysis of the Coleman data. This book supported Coleman's early conclusion of small positive effects of desegregation. The book also reached two other important conclusions: Blacks are on the average behind whites in first-grade achievement—about 1½ standard deviations—and fall even further behind during the elementary school years. Whites, in nearly all black schools, however, are even further behind.

Three, in 1972, Christopher Jencks and others again reanalyzed the Coleman data and found desegregation effects to be small and inconsistent. In reviewing other works, they contended that no conclusive study of desegregation had shown substantial positive effects.

Four, in 1972, David Armor also reviewed past studies and reached the same conclusion.

Five, in 1972, Thomas Pettigrew and others argued that Armor was biased and underestimated the positive effects of desegregation.

Six, in 1973, Ronald Edmonds and others accused Jencks of a strategy of removing the responsibility of the schools for enhancing black achievement. They also contended, however, that educational achievement is relatively unimportant for the social and economic success of blacks.

Seven, in 1975, Nancy St. John reviewed the research on school desegregation and black achievement and found it to be inconclusive. She also concluded, however, that classes of over 50 percent black students may hinder the learning of white students in them.

Eight, in 1977, Meyer Weinberg reviewed 48 studies of school desegregation and found that 29 of them, or 60 percent, showed positive effects on black achievement.

Nine, in 1977, Lawrence and Gifford Bradley reviewed studies of desegregation and concluded that there are both positive and negative effects, and that the evidence is inconsistent or inconclusive.

Ten, in 1977, Robert Crain and Rita Mahard reviewed 73 desegregation studies and found that 40 of them, or 55 percent, showed positive effects on the achievement of minority students.

Eleven, in 1979, Willis Hawley and Harold Miller debated the effects of desegregation on black achievement. Hawley argued that desegregation more often than not helps black achievement, and Miller found the evidence inconclusive.

Twelve, in 1979, the National Academy of Education assembled a panel of 20 desegregation experts chaired by Robert Havighurst of the University of Chicago. According to the panel report, the scholars were divided on the question of desegregation and black achievement. Pettigrew, for example, cited Crain and Mahard and argued that desegregation increases black achievement. Coleman, on the other hand, who originally claimed small positive effects, argued that as many studies show harm as those that show benefits to black achievement.

CONCLUSION

In conclusion, the debate on desegregation and achievement will probably continue but the research evidence is likely to remain inconsistent and controversial.

Despite a fairly large number of studies, no consensus has been reached. The 55 or 60 percent of studies that show positive results are insufficient to show statistical significance or to encourage any reasonable hope of improving school achievement by busing, since busing to achieve school desegregation works about as often as turning up heads in flipping a fair coin.

On the other hand, a number of educationally productive factors, such as increased study time, systematic courses, mastery programs, good teaching traits, parental support of school learning, and the close coordination of parental and school efforts are not only plausible to the educator and the layman alike, but also have consistently proven to produce superior learning results in hundreds of research investigations that have been conducted.

Thank you, Mr. Chairman.

Senator EAST. Thank you, Dr. Walberg.

[The bibliography and article submitted by Professor Walberg follow:]

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The Quiet Revolution In Educational Research

by Herbert J. Walberg, Diane Schiller, and Geneva D. Haertel

Mr. Walberg and his associates marshal impressive evidence that, properly funded, the research community in education can produce (and has produced over the past decade) highly useful findings.

The past decade of educational research has shown us the means to attain our educational goals much more fully than ever before. We shall attempt in this article to verify that surprising statement. After all, we were told only a dozen years ago, by reputable observers, that results of most research on the teaching-learning process were not significant. In fact, John Stephens, after reviewing several decades of research, said that most educational techniques seem to hinder as often as they aid learning.[1] There was good reason for this conclusion a decade ago. As Gene Glass pointed out, the total of human effort on behalf of research in education, at least that part officially supported by public and private funds, was less than 2,000 person-years in 1968.[2] In the same year, 15,000 full-time researchers investigated agricultural productivity; 60,000 persons engaged in research and development in the health sciences. Since that time, however, the U.S. Office of Education, the National Institute of Education, the National Science Foundation, and other public and private agencies have increased the funding of educational research notably, with sound results, as we shall see.

The impressive accumulation of educational research findings in the last decade seems to have gone unnoticed by many educators and the general public. It might indeed be concluded from widely publicized reports that the schools are pathological institutions and that neither educators nor research workers know how to cure their problems and increase their productivity. Charles E. Silberman's popular book, *Crisis in the Classroom*, reached this conclusion.[3] Stephens, the reviewer cited above, argued that learning is spontaneous; that is, maturational forces within the student cause learning to proceed at a given rate notwithstanding wide variations in educational conditions.[4] Christopher Jencks and his colleagues concluded that luck is the most important determinant of educational and occupational attainment and that improvements in schooling do not increase the educational and social mobility of the poor.[5] The *Equality of Educational Opportunity* survey by James Coleman and his associates was also interpreted as showing a lack of relationship between educational conditions and student learning.[6] The Neville Bennett study in England appeared to show that progressive teaching methods hinder student learning.[7]

But most of these accounts failed to consider the hundreds of *other* learning studies, the results of which are tabulated below, along with many studies on other relations between educational means or conditions and learning outcomes.

Since the public and practicing educators seldom read the voluminous and scattered technical literature on education, we assembled a systematic collection of research reviews published from January 1969 to the present on instructional and related research conducted in elementary and secondary schools and institutions of higher education. We examined the *Current Index to Journals in Education* under the topics "Literature Reviews" and "State of the Art," the American Educational Research Association's *Review of Educational Research* and *Review of Research in Education*, and reviews cited in these sources. We also included forthcoming work, but we selected for analysis only critical, evaluative reviews of at least four studies. Nearly all the research we included was carried out in classrooms rather than in laboratories under artificial conditions. Since the reviews present results of multiple studies and multiple comparisons within studies in a variety of ways, we imposed, where possible, a consistent framework: The numbers of positive and negative, as opposed to mixed, results of studies are given; and the percentage of positive results — those that support the superiority of the means or condition in question — of all positive and negative results is calculated.[8]

Exposure and Opportunity

A recent review uncovered 25 conclusive investigations of the relationship of increased time allocated for instruction (or devoted to learning by the student) to cognitive and affective learning. Table 1 shows that 24 of the 25 (96%) showed a positive relationship between time and cognitive learning. In view of this consistent relationship, several investigators whose work is forthcoming are studying the distribution of time that students engage in learning during the school day. Wayne C. Frederick of the Chicago Public Schools found that after subtracting time lost in absences, tardiness, interruptions, disruptions, and inattentiveness, as little as 25% of students' time in lower-achieving schools is actually spent on learning. David Berliner of the University of Arizona found in a sample of elementary classes in California that there was as little as 30 hours of effective instruction in mathematics during the school year. It is apparent even in the best schools that students often get stuck on a problem and need to wait for the teacher to get them started again. It seems clear that increasing the time students engage in the learning process, at least up to a point, might lead to large gains in learning.

Another recent review considered com-

HERBERT J. WALBERG (University of Chicago—DePaul University Chapter) is research professor of urban education, University of Illinois at Chicago Circle. DIANE SCHILLER is research assistant and GENEVA D. HAERTEL is research associate in the Office of Evaluation Research at the same institution. The authors thank Maurice J. Eash and Harriet Talmage for collegial support in this research, which was funded by the National Institute of Education (HEW-NIE G-78-0090) and the National Science Foundation (NSF-78-17374). The points of view and opinions stated do not necessarily represent the official position or policy of either agency.

A three-page appendix listing the reviews that are the basis of this report may be obtained by writing Walberg at the College of Education, University of Illinois at Chicago Circle, Box 4348, Chicago, IL 60680, or by writing Diane Kewer, Editorial Secretary, Phi Delta Kappan*, Box 789, Bloomington, IN 47402.*

"Stronger size/learning relationships formed by Glass and Smith in studies carried out after 1960 than those before 1940 indicate the increasing sophistication of educational research."

parisons of innovative and traditional curricula on measures both favorable and unfavorable to the new curricula. The results (Table 1) show that innovative curricula have consistent impact on tests that reflect the intent of the curricula. Similarly, students in traditional courses do better (but not with significant consistency) on measures that reflect the intent of the traditional courses. Thus the new curriculum elements a school chooses for its students are another decisive determinant of what the students learn.

Table 1 shows the results from several reviews of class size. All four comparisons show significant learning benefits for small classes. Better-analyzed studies show more consistent favorable effects and lend credibility to the results. Gene Glass and Mary Smith's very extensive analyses, moreover, reveal that studies that randomly assign students to small and large classes in true experiments show stronger positive benefits for smaller classes. This finding enhances confidence that smaller classes lead to greater achievement rather than that both are caused by other variables such as community wealth. Stronger size/learning relationships found by Glass and Smith in studies carried out after 1960 than in those before 1940 indicate the increasing sophistication of educational research. Although the inverse size/learning relationship is not the strongest or most consistent among the results summarized here, several estimates from the Glass and Smith work are impressive: Children who gain 1.0 grade equivalents on average per year in a class of 40 would gain 1.3 equivalents in a class of 20 and 1.6 if taught individually. If average pupils were taught in a class of 20 pupils from kindergarten through grade 6, they would be over two years ahead of similar pupils taught for the same length of time in a class of 40.

Nature of Instruction

Table 1 shows a variety of effects for behavioral instruction on college as well as elementary and secondary school students. The prevalent form of behavioral instruction at the college level is referred to as "Personalized Systems of Instruction" (PSI), which has the following components: reliance on the written word in the form of small units of instruction; student self-pacing through these units; mastery (that is, usually perfect or near-perfect performance required on each unit before proceeding to the next); and assessment by repeated testing administered by

Table 1. A Selective Summary of a Decade of Educational Research

Research Topics	No. of Results	Percent Positive
Time on learning	25	95.0
Innovative curricula on:		
Innovative learning	45	97.8
Traditional learning	14	35.7
Smaller classes on learning:		
Pre-1954 studies	53	66.0
Pre-1954 better studies	19	84.2
Post-1954 studies	11	72.7
All comparisons	691	60.0
Behavioral instruction on:		
Learning	52	98.1
"Personalized Systems of Instruction" on learning	103	93.2
Mastery learning	30	96.7
Programmed instruction on learning	57	80.7
Adjunct questions on learning:		
After text on recall	38	97.4
After text on transfer	35	74.3
Before text on recall	13	76.9
Before text on transfer	17	23.5
Advance organizers on learning	32	37.5
Analytic revision of instruction on achievement	4	100.0
Direct instruction on achievement	4	100.0
Lecture versus discussion on:		
Achievement	16	68.8
Retention	7	100.0
Attitudes	8	86.0
Student- versus instructor-centered discussion on:		
Achievement	7	57.1
Understanding	6	83.0
Attitude	22	100.0
Student- versus instructor-led discussion on:		
Achievement	10	100.0
Attitude	11	100.0
Factual versus conceptual questions on achievement	4	100.0
Specific teaching traits on achievement:		
Clarity	7	100.0
Flexibility	4	100.0
Enthusiasm	5	100.0
Task orientation	7	85.7
Use of student ideas	8	87.5
Indirectness	6	83.3
Structuring	3	100.0
Sparing criticism	17	70.6
Psychological incentives and engagement		
Teacher's cues to student	10	100.00
Teacher reinforcement of student	16	87.5
Teacher engagement of class in lesson	6	100.00
Individual student engagement in lesson	15	100.0
Open versus traditional education on:		
Achievement	26	54.8
Creativity	12	100.0
Self-concept	17	88.2
Attitude toward school	25	92.0
Curiosity	6	100.0
Self-determination	7	85.7
Independence	19	94.7
Freedom from anxiety	8	37.5
Cooperation	6	100.0
Social-psychological climate and learning:		
Cohesiveness	17	85.7
Satisfaction	17	100.0
Difficulty	16	86.7
Formality	17	64.7
Goal direction	15	73.3
Democracy	14	84.6
Environment	15	85.7
Speed	14	53.8
Diversity	14	30.8
Competition	9	66.7
Friction	17	0.0
Cliqueness	13	8.3
Apathy	15	14.3
Disorganization	17	6.3
Favoritism	13	10.0
Motivation and learning	232	97.8
Social class and learning	620	97.6
Home environment on:		
Verbal achievement	30	100.0
Math achievement	22	100.0
Intelligence	20	100.0
Reading gains	6	100.0
Ability	8	100.0

student proctors, with maximum credit for success and no penalty for failure. Students continue working at their own pace through the units until they reach a satisfactory grade in the course. Three reviews of behavioral instruction show the superiority of PSI and modified PSI techniques over conventional lecture and discussion methods at the college level. The findings are consistent across 12 subjects for small, medium, and large samples on achievement, retention, and attitudes and interest in the subject.

Mastery learning, more often found in secondary and elementary schools, has the following components: clear goals and procedures for what is to be learned, specific instructional objectives, small units of learning, corrective feedback on progress, flexible learning time, alternative modes of instruction, and cooperative learning with peers. Mastery learning is similar to PSI in assuming that each student can learn if given appropriate instruction and sufficient time. Mastery learning also shows results consistently superior to conventional instruction on achievement, retention, and attitudes.

Programmed instruction uses written materials in which instructional elements are presented in units called "frames." Each frame requires an active response from the student, and the length of the frame, varying from short paragraphs to several pages, is designed to suit the abilities of the typical student. Programmed materials usually enable students to skip rapidly over material that is already known, to "branch" to needed correctives, and to proceed at a suitable individual pace. The reviews (Table 1) indicate that programmed instruction has consistently more favorable effects on achievement and interest in the subject than traditional classroom procedures.

Research on instructional radio and television and computer-assisted instruction is beyond our scope, since most of the reviews were published before 1969 and concern learning in special rather than classroom settings. However, conclusions of a review by Dean Jamison et al. should be mentioned.[9] Radio, television, and computer-assisted instruction are about as effective as conventional instruction. Computer-assisted instruction, as a replacement or supplement, often results in substantial savings of student time. The authors point out the need for exploring the productivity and cost-efficiency of substituting capital for labor in education, since the unit costs of media and technology decline with increasing usage.

The term "mathemagenic" was coined by psychologists in the early 1960s from the Greek roots *mathema* ("learning") and *genic* ("give birth to"). Thus mathemagenic techniques give birth to learning or encourage it in some way that may be exemplified in the materials of instruction, the structuring of the content, or specific teaching strategies (Table 1).

"Adjunct questions" are those inserted in textual material; for example, a 2,000-word passage concerning the life of Charles Darwin was divided into 20 paragraphs of 10 lines each. Students answer one or more questions before or after each paragraph. Adjunct questions consistently benefit recall of information when given after passages but are less consistent in enhancing transfer of the information to new situations when given before the text.

"Advance organizers" are used as an introduction to relate new content to what the student already knows. An advance organizer, for example, was used to point out the differences and similarities between Buddhism and Christianity before a three-day instruction session, since the material on Buddhism was new and the material on Christianity was familiar to most students. Such organizers are usually presented at a higher level of abstraction than the instructional elements themselves. Research on advance organizers shows inconsistent effects on learning.

"Analytic revision of instruction" refers to lesson development that includes instructional objectives and trial-and-error revision of methods and materials until the objectives are reached. For example, a lesson on writing mathematical ratios is presented and student performance is evaluated; the lesson is then revised on the basis of difficulties encountered by the students and presented a second time. The process continues until the objectives are met. Four studies of this technique support the hypothesis that it is more efficacious than conventional methods.

"Direct instruction" pertains to those methods in which the teacher controls the timing and sequencing of instruction, chooses materials, and monitors student performance. Direct instruction generally focuses directly on the content of achievement tests. Four studies of this technique showed greater effectiveness than conventional methods in producing achievement gains. Since analytic and direct instruction may amount to teaching the test and only four studies are available on each, the results should be interpreted cautiously.

Research at the college level yields interesting results on teaching techniques and locus of instruction (Table 1). Discussion is about equal to lecturing on achievement but is consistently superior on retention. Student-centered discussion, moreover, is superior to instructor-centered discussion on attitude; and student-led discussion is superior to instructor-led discussion on both achievement and attitude.

It is informative to compare these results with the impact on achievement of factual in contrast to conceptual questions. Four studies indicate that factual teacher questions have greater impact on achievement, perhaps because many teacher-made and standardized tests sample the lower levels of cognitive processes such as

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Open education, authentically implemented, consistently reaches its goals in creativity, self-concept, school attitudes, curiosity, and independence.

memory rather than comprehension and analytic skills. This finding must be interpreted cautiously but suggests that educators should consider the trade-offs between lower and higher levels of cognitive attainment, that research workers should include multiple measures of outcomes in future work, and that reviewers should tabulate results across studies separately for each learning outcome.

Table 1 shows the results of teaching techniques observed in elementary (mostly primary) classrooms. The reviewers, Barak Rosenshine and Norma Furst, appear somewhat inconsistent in reviewing this evidence, since in some cases they counted studies as positive that yielded one positive significant correlation among several that were calculated. N. L. Gage's independent and explicit review of the evidence on teacher indirectness, praise, acceptance, and criticism, however, confirms certain Rosenshine-Furst results with a high degree of statistical probability.[10] These results indicate that achievement is enhanced under teachers who are clear about their expectations, goals, and methods for learning; who are flexible in their responses to students; who show enthusiasm for the lesson and for student learning; who are businesslike and task-oriented; who use student ideas in leading the lesson; who attempt to elicit answers to questions by students rather than tell the answers; who use structuring comments that inform the student of the purpose and organization of the lesson content; and who avoid excessive criticism.

Table 1 shows the results of a review of psychological studies of teacher behaviors that stimulate students and reinforce their desirable responses. Both teacher behaviors are consistently related to achievement and achievement gains. Moreover, teacher engagement of the class in the lesson as well as the amount of individual student engagement in the lesson as percentages of total time also show consistently superior results.

Table 1 shows an analysis of a review of many studies contrasting "open" with traditional education. Open education is similar to progressive education of the 1920s in that students in humane, enriched classrooms are given a degree of autonomy to plan jointly with the teacher the goals, pace, method, and evaluation of learning.[11] Since it is often confused with permissiveness or with open space classrooms, it is sometimes termed "informal education." Despite the fact that many people in the open education movement feared conventional evaluations because they were intent on going beyond traditional achievement test outcomes, 76 of the 102 studies comparing open and traditional methods show no significant differences between the two and 54.8% of the 26 significant studies actually favored open education on achievement measures. Thus it does not appear that open education, on average, impairs conventional achievement test performance.

On the other hand, open education, when it has a significant effect — probably when it is authentically implemented — produces consistently positive results on goals it is intended to attain in creativity, self-concept, school attitudes, curiosity, and independence. Because replication is the essence of science, the results should be informative to those who have concluded from the widely publicized Bennett study that open education has failed.[12] In addition, the results suggest that researchers should measure learning outcomes that go beyond achievement. There is no present basis for knowing, for example, whether behavioral instruction and Personalized Systems of Instruction, even though they may promote achievement and retention, lead to greater creativity, curiosity, and independence.

Social-Psychological Environments

Twelve studies report on correlations between measures of social-psychological climate of classes and various types of learning in the United States, Canada, Australia, and India.[13] Table 1 shows a tabulation of correlations of student perceptions of the climate and measures of cognitive, attitudinal, and behavioral learning outcomes (in most cases adjusted for intelligence and corresponding pretests). The cognitive measures tap factual knowledge as well as higher-level conceptual understanding; the attitudinal measures tap interest in the subject matter and in subject-related careers; and the behavioral indices are counts of extramural voluntary activities associated with course content. Greater amounts of all three types of learning take place, on average, in classes that students perceive as cohesive, satisfying, difficult or challenging, democratic, and providing the physical setting and materials required for learning. Perceived climate characteristics that are negatively correlated on average with learning gains are: friction among the class members, emphasis on subgroups or cliques within the class, apathy toward the lesson, disorganized content and procedures, and favoritism toward some class members. Results from other research indicate that characteristics of the students, the teacher, the subject matter, and instruction determine the nature of the social-psychological climate of the class. These effects appear to be mediated by student perceptions of the climate, which in turn predict various types of learning.

Many psychologists today have strong cognitive or behavioral persuasions. Social psychologists more often emphasize feelings and motivation as determinants of learning. Nearly all studies summarized in recent reviews (see Table 1) show that the degree of student motivation is consistently reflected in the amount of learning that takes place.

Student motivation and classroom climate are not completely under the control of teachers and other educators. Although educators may to some extent enhance these determinants of learning, the abilities, attitudes, and behaviors the child brings to school are influenced by home environment. Table 1 shows the consistency of correlations of social class and of parental stimulation in the home with achievement and ability. The results indicate that social-class measures are consistently but weakly correlated with student achievement in school and that measures of parental stimulation and encouragement of the child (obtained by interviews with the parent in the home) are much more valid predictors of achievement and abilities. Parental stimulation is strongly correlated with verbal achievement, moderately correlated with mathematics achievement and intelligence, and relatively weakly correlated with spatial and reasoning ability. Only one longitudinal study of home environments and achievements has been conducted. This British study of three age groups of boys and girls indicates that measures of home environment predict the amount of reading gains over a four-year period. Contrary to some speculations, the study showed that the correlations of parental stimulation and student achievement are about equal in samples of primary and middle school children and older adolescents. Two field evaluations of intervention programs that strongly concentrate school and parent resources on reading achievement in socially depressed areas of Chicago's inner city and of Flint, Michigan, revealed reading test gains comparable to those in middle-class neighborhoods.[14] These field evaluations require further replication to test the generalizability of such joint school-family programs to increase learning.

Conclusions

The tabulations of results of recent reviews on the relation of instructional and other educational conditions to learning outcomes yield a number of consistent, positive results with definite policy and practical implications. Greater funding of educational research in the last decade has brought a greater number of disciplined investigators to the field and allowed them to improve measurements of educational goals and means; to increase the statistical and experimental control of effects; and, while drawing on the theoretical insights from psychology and the social sciences, to relate research to practical issues of educational productivity.

We conclude that certain conditions and methods consistently produce certain outcomes but that no single method or set of conditions is superior on all outcomes. The greatest confidence can be placed in the effects of opportunity, exposure, and instruction on achievement, retention, and attitudes, because many experiments with random assignments of students to alternative conditions are available for analysis. Less confidence can be placed in the effects of social-psychological conditions, although many are plausible, because they have been less frequently investigated and are more often uncontrolled or statistically, rather than experimentally, controlled.

Much research remains to be done on certain conditions of learning and particularly on their effects on outcomes such as voluntary learning during and after instruction and on such traits as creativity, self-concept, independence, and ethical maturity. We also need to know more about applications in extramural settings. It is possible, although our survey yielded no creditable evidence, that some instructional methods are consistently more effective for some children; this is an area of needed research.

In summary, a large and growing body of research evidence that was unavailable a decade ago constitutes one useful basis not only of future research but of educational policy and decision making. Together with the values and wisdom of school board members, educators, parents, and students, continued scientific inquiry should contribute much to educational productivity in the future.

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1. John M. Stephens, *The Process of Schooling: A Psychological Examination* (New York: Holt, Rinehart and Winston, 1967).

2. Gene V Glass, "The Wisdom of Scientific Inquiry," *Journal of Research in Science Teaching*, vol. 9, no. 1, 1972, pp. 3-18.

3. Charles E. Silberman, *Crisis in the Classroom* (New York: Random House, 1970).

4. Stephens, op. cit.

5. Christopher Jencks et al., *Inequality: A Reassessment of the Effect of Family and Schooling in America* (New York: Basic Books, 1972).

6. James S. Coleman et al., *Equality of Educational Opportunity* (Washington, D.C.: U.S. Office of Education, [illegible]).

7. Neville Bennett, *Teaching Styles and Pupil Progress* (Cambridge, Mass.: Harvard University Press, 1976).

8. With obvious justification, many reviews tabulate not the overall results of each study but the results specific to several conditions, outcomes, and subgroups such as boys and girls in the same classes. Although such tabulations are valuable in ascertaining differential effects of conditions on outcomes and subgroups, they cannot be considered independent sources of evidence since, for example, what improves reading vocabulary may also improve comprehension and benefit both boys and girls. So as not to exclude such valuable reviews from our survey, they are summarized in their original detail. Because their results are not independent, they should be interpreted cautiously. In most cases, however, nonindependence is beside the point, because of the uniformity and extensiveness of the findings. University groups at Colorado, Harvard, Illinois at Chicago, Michigan, Stanford, Wisconsin, and Yale are analyzing not only the consistency of the results as reported here but their magnitude and combined probabilities. Such intensive analyses, we believe, will be even more impressive than our initial assessments of consistency.

9. Dean Jamison, Patrick Suppes, and Stuart Wells, "The Effectiveness of Alternative Media: A Survey," *Review of Educational Research*, vol. 44, no. 1, 1974, pp. 1-48.

10. N. L. Gage, *The Scientific Basis of the Art of Teaching* (New York: Teachers College Press, 1978).

11. Herbert J. Walberg and Susan C. Thomas, "Open Education: An Operational Definition and Validation in Great Britain and the United States," *American Educational Research Journal*, vol. 9, no. 3, 1972, pp. 197-202.

12. Bennett, op. cit.

13. Herbert J. Walberg, "The Psychology of Learning Environments," in Lee S. Shulman, ed., *Review of Research in Education*, vol. 4 (Itasca, Ill.: F. E. Peacock, 1976), pp. 142-78.

14. Mary B. Smith, "School and Home," in A. Harry Passow, ed., *Developing Programs for the Educationally Disadvantaged* (New York: Teachers College Press, 1968); Herbert J. Walberg, Robert E. Bole, and Herschel Waxman, *School-Based Family Socialization and Reading Achievement in the Inner City* (Chicago: University of Illinois at Chicago Circle, Office of Evaluation Research, 1976). □

Senator **East**. Dr. Scott?

STATEMENT OF RALPH S. SCOTT, JR., PROFESSOR OF EDUCATION, UNIVERSITY OF NORTHERN IOWA, CEDAR FALLS

Mr. **Scott**. Thank you, Mr. Chairman.

First let me express my appreciation for this opportunity to testify before the Senate subcommittee this morning about my concerns and aspirations for the attainment of equal educational opportunity in this country.

ARE SEGREGATED SCHOOLS, PER SE, INFERIOR

Equal opportunity and achievement are inextricably intertwined. From the 1950's until the 1970's by which time most school districts in the country had suffered serious busing-related disruptions, it was taken as an article of morality and faith that segregated schools were inferior.

Therefore, it was expected that minority students attending forcibly integrated or desegregated schools would register higher learning levels.

Had this been true, it would be possible to establish and justify a linkage between busing and the constitutional requirement of equal opportunity. However, it is now clear to most Americans, and especially majority and minority parents and children with first-hand experience in busing, that the busing rationale lies in ruin.

Few Americans have rejoiced over the unexpected transformation of the busing dream into an educational nightmare.

I share the disappointment of many who hope that a simple solution would suffice for a complex problem. Unexpectedly, the Nation has witnessed a decline in the quality of schooling as resources have poured into an educational practice that is in itself counterproductive.

This morning I would like to discuss the various ways in which desegregation has proven to be harmful, but time constraints require that we maintain a focus on the achievement consequences.

ALLEGED ACHIEVEMENT BENEFITS OF BUSING ARE UNVERIFIABLE

On this emotional subject, there has been a good deal of statistical sleight of hand. New York's Senator Patrick Moynihan once prefaced a book on busing with these remarks, and with his Irish background he could do this, of course:

"Of course I trust ye, McClury, but I want to cut those cards."

After a generation of unrealized expectations, most Americans realize that the only way in which the cards on busing will be fairly cut is to deal not with polemics but with raw and primary statistics.

The myth of achievement gains has been resuscitated down through the years by Federal bureaucracies, the media, prestigious scholars, academic centers, politicians, and courts. Let us review some of the landmark studies upon which the desegregation achievement thesis has been built.

In 1959, superintendents of 17 major school districts testified before the U.S. Civil Rights Commission. They all claimed that busing fostered minority learning. However, only the Louisville administrator presented test scores.

Today even those scores are unavailable, and there is not one shred of evidence in any of those 17 cities that busing enhances long-term learning of minority students.

Meyer Weinberg, aided by the influential educational organization Phi Delta Kappa and the U.S. Office of Education, published in 1968 a book intended to assess busing effects.

He concluded that there was a strong evidence that desegregation benefited the academic learning of Negro children. Weinberg claimed that the positive conclusions he reached would be supported by the Coleman report and the U.S. Commission on Civil Rights' publication, entitled "Racial Isolation."

Weinberg's report was given wide and favorable national media coverage. However, a decade after the report appeared, James Coleman, major author of the Coleman report, stated: "The assumption that integration would improve achievement of lower class black children has now been shown to be fiction."

Similarly, racial isolation provided no firm support for the achievement-busing linkage. This report drew heavily from the now-disavowed Coleman findings.

Moreover, as is commonly the case in publications of the U.S. Commission on Civil Rights, the study speaks with a forked tongue. On the one hand it states that "research has not yet given clear answers to whether racial balancing within the schools is related to children's performance and achievement." With this I agree.

ACHIEVEMENT CLAIMS NOT SUPPORTED STATISTICALLY

However, inconsistently, then it is claimed that busing had raised minority learning in four cities: Syracuse, Berkeley, Seattle, and Philadelphia. My personal correspondence with superintendents of those four school districts has failed to disclose any statistical affirmation whatsoever of Commission claims.

Racial isolation is not the only example of surprisingly inaccurate research conducted by the agency charged with congressional factfinding.

Consider another illustration, one which reminds me of the folklore of how the pig got over the stile.

The 1974 yearbook of the World Book Encyclopedia reported that the U.S. Commission on Civil Rights found that desegregation had produced higher educational attainment in 10 school districts.

I wrote to the editor of World Book who could only support the statement by sending a Xerox copy of a special news release from the New York Times. The Times informed me that it had received its information from the U.S. Commission on Civil Rights.

A letter to the Commission produced only the names of the 10 school districts selected for this particular report. Not a single one of the 10 superintendents could supply evidence that busing raised achievements, and their responses provide insight into the tragically high error level which prevails on this issue.

From Pontiac, Mich., the administrator was at a loss to know how the facts could have been so completely twisted.

The Winston-Salem, N.C., superintendent wrote that he was puzzled by what the Commission reported.

"I can't imagine the Commission making such a statement," said the superintendent of Tampa, Fla.

And the superintendent of Glynn County, Ga., replied that the information he gave the Commission did not indicate an increase in quality but showed no substantial decrease in test scores since desegregation. However, that is a far cry from what had been reported to the public by World Book, New York Times, and the U.S. Commission on Civil Rights.

I recently concluded a survey of all major published reports which dealt with the desegregation achievement question. Throughout I honed in on the systematic organization of primary and raw data.

In this study, comparisons were made of conclusions reached in five major surveys. These reviews separately assessed eight studies, whose results have been regarded as the strongest available evidence that desegregation hikes minority learning.

This appraisal revealed that the experts themselves are split. In most cases, however, they concluded that busing had aided minority learning.

It may be significant that the most positive results were reported by reviewers who had been most generously funded over the years by the Federal bureaucracy.

Raw data of all eight studies failed to yield hard evidence that busing had upgraded long-term minority learning in a single instance. It was impossible to identify one district in which long-term beneficial learning effects could be clearly traced to busing.

Permit me to briefly describe some of the flaws contained in two of these exemplary experiments. Anderson's experimental and control students were not representative of the larger minority population, nor were the two groups of students comparable. Also, parents of the bused children volunteered for desegregation while parents of the nonbused children did not. In summing up his study, Anderson admits that the reported achievement differences could easily be attributed to chance. In a Chapel Hill inquiry, Prichard reported no differences in reading achievement, and acknowledged that the reported math gains might be traced to a very likely cause: inauguration of a statewide curriculum revision in mathematics over the experimental period. And these are two of the best pieces of proof that busing promotes minority learning?

QUESTIONS CONCERNING FEDERALLY FUNDED RESEARCH

On September 16 of this year, the Associated Press released a report conducted by Dr. Willis Hawley and 15 other educators at the Center for Education and Human Development at Vanderbilt University. This 7-year study was underwritten by the U.S. Office of Civil Rights and the National Institute of Education.

Regrettably, the objectivity of this study was compromised from the start. Federal guidelines specified the purpose was, and I quote: "To improve potential benefits of desegregation."

This phrasing effectively eliminated from grant consideration any scholar who might be open to possibilities both that neighborhood schools are best for all students and that the experiment could uncover evidence that busing was nonhelpful or even counterproductive.

Dr. Hawley interpreted the study's findings as supportive of the position that desegregation improves minority learning. I am sorry that as yet I have been unable to read this study, but I find it difficult to understand the reported conclusions.

Included among the cities from which Dr. Hawley drew his data are Charlotte, Nashville, and Louisville.

In conducting current research, I have been in contact with school officials of those three districts. Not one has been able to provide evidence of long-term achievement gains associated with busing. Instead, the statistics lead me to conclude that busing may very well have created significant educational problems in those cities.

As for Nashville-Davidson County, Dr. Chester E. Finn, Jr., professor of education and public policy at Vanderbilt, assessed school circumstances in the September 15 issue of the Wall Street Journal. Dr. Finn arrives at conclusions diametrically opposed to those reached by Dr. Hawley and his colleagues. One of Finn's observations: There has been a preoccupation with numerically determinated educational "equity," that largely ignores school quality. Finn also notes that NAACP leaders express concern that the school district has become populated by the poor and black. Moreover, Thomas G. Caulkins, coordinator of group testing for the Nashville-Davidson County schools told me in May of this year that there is no evidence whatsoever that busing has promoted minority learning in the schools wherein he is responsible for assessment.

What can be concluded from this? Simply put, the Nation has, on busing effects, been misinstructed by school personnel, misinformed by the media, misled by social scientists, misused by State and Federal bureaucracies and commissions, misunderstood by legislators, and misruled by courts.

To again quote Senator Moynihan, Americans have been sold vast amounts of snake oil by those charged with providing useful and accurate information. One result has been to subject minority children and parents to cruel disillusionment.

NEED FOR EFFECTIVE REMEDIES

Yet few would deny both the hope and the need for significant educational reform. The abandonment of forced busing is an essential ingredient of any meaningful upgrading of American schooling.

Is there really any lingering doubt about the ineffectiveness of busing? If so, then let advocates assume direct and visible responsibility for claims they make.

Dr. Hawley has said: "If it were true that no one benefited from school desegregation, it would be ridiculous to pursue such policies."

Very well. Let advocates demonstrate the benefits. This committee could foster a resolution of the question once and for all by endorsing a symposium of scholars, numerically balanced on stance concerning the achievement-desegregation question. The participants would publicly debate the question but give no participant, pro or con for busing, any hiding place.

Promote full media exposure of the symposium with emphasis on the manner in which raw statistics were gathered, organized, and interpreted.

Let the public in on the manner in which chicanery has governed public policymaking on busing over decades.

Judges, legislators, scholars, and school administrators would no longer have an excuse for gross ignorance of busing effects.

What would be the public reaction upon learning the basis for James Coleman's contention that Thomas Pettigrew, responsible for so much ill-fated busing, lacks social responsibility and is so racially confused that if he "saw the fires in the sky during the riots of 1967, he would have attributed them to an extraordinary display of Northern Lights."

Would we ever again have grossly erroneous public utterances from judges and attorneys? Some illustrations of this are:

Julius L. Chambers, prominent civil rights attorney, has asserted that social scientists agree that achievement gains will accrue from desegregation.

Judge Alfred Gitelson has claimed that segregated schools are responsible for the generally lower achievement performance of black and Chicano students.

Given open public debate, Americans would know better. There would be increased insistence on reasonable accuracy. The tail would have a harder time wagging the dog.

If, however, the achievement desegregation thesis is indeed as dead as facts would indicate, then there is no need for further public debate. This committee would deserve kudos if it hastened the demise of racial balancing projects throughout the land. Such a bold, but long-overdue, move would require combined efforts of educational and legal scholars. Yet the rudimentary facts seem reasonably clear.

In the 1954 *Brown* ruling, the Supreme Court moved only against assignments of students to schools on the basis of racial clasification. Present racial balancing efforts, therefore, seem contrary to the spirit and letter of *Brown*.

If equal or better education is available in neighborhood schools, then the constitutional rights of children are better served through colorblind attendance policies. Research shows that most minority and most majority parents, especially those who have experienced the sad realities of busing, seek to end the practice. If these parents are granted their wish, they can then join forces with others in the launching of a genuine search for remedies which promise to improve educational practice for all students, irrespective of race or social class.

Thank you.

Senator EAST. Thank you, Dr. Scott.

[The prepared statement of Dr. Scott follows:]

PREPARED STATEMENT OF PROF. RALPH S. SCOTT, JR.

First, let me express my appreciation for this opportunity to testify before the Committee this morning about my concerns and aspirations for the attainment of equal educational opportunity in this country. Equal opportunity and achievement are inextricably intertwined, and from the 1950's until the 1970's---by which time most school districts in this country had suffered serious busing-related disruptions---it was taken as an article of morality and of faith that segregated schools were inferior. Therefore, it was expected that minority students attending forcibly integrated, or desegregated, schools would register higher learning levels. Had this been true, it would be possible to establish,and to justify, a linkage between busing and the constitutional requirement of equal opportunity. However,it is now clear to most Americans, and especially minority and majority parents and children with first hand experience in desegregation, that the busing rationale lies in ruin.

Few Americans have rejoiced over the unexpected transformation of the busing dream into an educational nightmare. I share the disappointment of many, who hoped that a simple solution would suffice for a complex problem. Unexpectedly, the Nation has witnessed a decline in the quality of schooling as resources have poured into an educational practice that is in itself counterproductive. This morning I would like to discuss the various ways in which desegregation has proven to be harmful, but time constraints require that we maintain a focus on the achievement consequences.

On this emotional subject, there has been a good deal of statistical sleight-of-hand. New York's Senator Patrick Moynihan once prefaced a book on busing with the remarks "Of course I trust ye, McClury...but I want to cut those cards." After a generation of unrealized expectations, most Americans realize that the only way in which the cards on busing will be fairly cut is to deal not with polemics but with raw statistics. The myth of achievement gains has been resuscitated down through the years by federal bureaucracies, the media, prestigious scholars, academic centers, politicians and the courts. Let us review some of the landmark studies upon which the desegregation-achievement thesis has been built.

In 1959, superintendents of 17 major school districts testified before the U. S. Civil Rights Commission; they all claimed that busing fostered minority learning. However, only the Louisville administrator presented test scores. Today, even those scores are unavailable and there is not a shred of evidence in any of those 17 cities that busing enhances long-term learning of minority students.

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1. Weinberg, Meyer. Desegregation research: An appraisal. Bloomington,Indiana: Phi Delta Kappan, 1966.

would be supported by the Coleman Report[2] and the U.S. Commission on Civil Rights publication, Racial Isolation.[3] Weinberg's report was given wide and favorable national media coverage. However, a decade after the report appeared, James Coleman, major author of the Coleman Report, stated "The assumption that integration would improve achievement of lower class black children has now been shown to be fiction."[4]

Similarly, Racial Isolation provides no firm support for the achievement-busing linkage. This report drew heavily from the now-disavowed Coleman findings. Moreover, and as is commonly the case in publications of the U. S.Commission on Civil Rights,the study speaks with a forked tongue. On the one hand, it stated that "research has not yet given clear answers to whether racial balancing within the schools is related to children's performance and achievement." With this I agree. But then, inconsistently, it is claimed that busing had raised minority learning in four cities: Syracuse, Berkeley, Seattle, and Philadelphia. My personal correspondence with superintendents of those four school districts has failed to disclose any statistical affirmation of Commission claims.

Racial Isolation is not the only example of surprisingly inaccurate research conducted by the agency charged with congressional fact-finding. Consider another illustration, one which reminds me of the folktale of how the pig got over the stile. The 1974 Yearbook of the World Book Encyclopedia reported that the U.S. Commission on Civil Rights found that desegregation had produced higher educational attainment in ten school districts.[5] I wrote to the editor of World Book, who could only support the statement by sending a xerox copy of a special news release from the New York Times. The Times informed me that it had received its information from the U. S.Commission on Civil Rights. A letter to the Commission produced only the names of the ten school districts selected for this particular report. Not one of the ten superintendents could supply evidence that busing raised achievements, and their responses provide insight into the tragically high error level which prevails on this issue.

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[2] Coleman, James S.,et al., Equality of Educational Opportunity. Washington,D.C.: U.S. Government Printing Office, 1966.

[3] Racial Isolation in the Public Schools. Report of the U.S.Commission on Civil Rights. Washington,D.C.: U.S.Government Printing Office, 1967.

[4] Coleman, James S. School desegregation and city suburban relations. Paper presented at community college, Dearborn,Michigan, April 21, 1978.

[5] Hechinger, Frederick M. 1974 Yearbook of the World Book Encyclopedia. Chicago: Field Enterprises, 1974, p.302.

I recently concluded a survey of all major published reports which dealt with the desegregation-achievement question.[6] Throughout, I honed in on systematic organization of primary data. In this study, comparisons were made of conclusions reached in five major reviews. These reviews, separately, assessed eight studies whose results have been regarded as the strongest available evidence that desegregation increases minority learning. This appraisal revealed that the experts themselves are split. In most cases, however, they concluded that busing had aided minority learning. It may be significant that the most positive results were reported by reviewers who have been most generously funded over the years by the federal bureaucracy. Raw data of all eight studies failed to yield hard evidence that busing had upgraded long-term minority learning in any single instance: it was impossible to identify a single school in which long-term beneficial learning effects could be clearly traced to busing.

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[6] Scott, Ralph S. Black achievement and desegregation: A research synthesis. Alexandria,Virginia: American Education Legal Defense Fund, 1981.

[7] Anderson, Louis V. The effect of desegregation on the achievement and personality patterns of Negro children. Unpublished doctoral dissertation, George Peabody College for Teachers University Microfilm, Nashville,Tennessee, 66-11,237, 1966.

[8] Prichard, Paul N. Effects of desegregation on student success in the Chapel Hill School, Integrated Education, Vol.7, 1969, pp 33-38.

[9] "School integration found to aid minorities," Associated Press Release, Washington Post, September 16, 1981 , New York, September 1981.

As for Nashville-Davidson County, Dr. Chester E. Finn, Jr., professor of education and public policy at Vanderbilt, assessed school circumstances in the September 15 issue of the Wall Street Journal.[10] Dr. Finn arrives at conclusions diametrically opposed to those reached by Dr. Hawley and his colleagues. One of Finn's observations: there has been a preoccupation with numerically-determined educational "equity," that largely ignores school quality. Finn also notes that NAACP leaders express concern that the school district has become populated by the poor and black.

What can be concluded from this? Simply put, the Nation has, on busing effects, been misinstructed by school personnel, misinformed by the media, misled by social scientists, misused by state and federal bureaucracies and commissions, misunderstood by legislators, and misruled by courts. To again quote Senator Moynihan, Americans have been sold vast amounts of snake oil by those charged with providing useful and accurate information. One result has been to subject minority children and parents to cruel disillusionment.

Yet few would deny both the hope and the need for significant educational reform. The abandonment of forced busing is an essential ingredient of any meaningful upgrading of American schooling. Is there any lingering doubt about the ineffectiveness of busing? If so, then let advocates assume direct and visible responsibility for the claims. Dr. Hawley has said "If it were true that no one benefited from school desegregation, it would be ridiculous to pursue such policies."[11] Very well. Let advocates demonstrate the benefits. This Committee could foster a resolution of the question--- once and for all-- by endorsing a symposium of scholars, numerically balanced on stance concerning the achievement-desegregation question. The participants would publicly debate the question. But give no participant a hiding place. Promote full media exposure of the symposium, with emphasis on the manner in which raw statistics were gathered, organized and interpreted. Let the public in on the manner in which raw statistics were gathered, organized and interpreted. Let the public in on the chicanery that has governed policy making. Judges, legislators, scholars and school administrators would no longer have an excuse for gross ignorance of busing effects.

What would be the public reaction upon learning the basis for James Coleman's contention that Thomas Pettigrew, responsible for so much ill-fated busing, lacks social responsibility and is so racially confused that if he "saw the fires in the sky during the riots of 1967 he would have attributed them to an extraordinary display of Northern

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[10] Finn, Chester E., Wall Street Journal, September 15, 1981.

[11] Hawley, Willis D. Getting the facts straight about the effect of school desegregation. Educational Leadership, Vol.36(5), February 1979, pp 314-321.

Lights"?[12] Would we ever again have grossly erroneous public utterances from judges, and attorneys? Some illustrations: Julius L. Chambers, prominent civil rights attorney, has asserted that social scientists agree that achievement gains will accrue from desegregation;[13] Judge Alfred Gitelson has claimed that segregated schools are responsible for the generally lower achievement performance of black and Chicano students.[14] Americans would know better. There would be increased insistence on reasonable accuracy. The tail would have a harder time wagging the dog.

If, however, the acievement-desegregation thesis is indeed as dead as facts indicate, then there is no need for further public debate. This Committee would deserve kudos if it hastened the demise of racial balancing projects throughout the land. Such a bold, but long overdue, move would require combined efforts of educational and legal scholars. Yet the rudimentary facts seem reasonably clear.

In the 1954 Brown ruling, the Supreme Court moved only against assignments of students to schools on the basis of racial classification. Present racial balancing efforts, therefore, seem contrary to the spirit and letter of Brown. If equal or better education is available in neighborhood schools, then the constitutional rights of children are better served through color-blind attendance policies. Research shows that most minority and most majority parents, especially those who have experienced the sad realities of busing, seek to end the practice. If these parents are granted their wish, they can then join forces with others in the launching of a genuine search for remedies which promise to improve educational quality for all students, irrespective of race or social class.

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12. Coleman, James S., in Wilkinson, J.Harvie. From Brown to Bakke: The Supreme Court and schoolintegration, 1954-1978. New York: Oxford University Press, 1979, p.190.

13. Chambers, Julius L.Implementing the promise of Brown, in Rist,Ray C.and Anson, R.J.(Eds.) Education,social science and the judicial process.New York: Teacher's College Press, 1977, p.43.

14. Gitelson, A., as cited in Sedlacek, W.E. and Brooks,G.C. Racism in American education. Chicago: Nelson-Hall, 1976, p.2.

Senator EAST. Time is always a precious factor, and we have another panel yet to go. We hope to be done here in the vicinity of 12:30.

What I would like to do is take about 5 minutes to respond to you gentlemen—perhaps it is more a summation of my own reaction to it. At the proper time, I would appreciate your responses to it if time will allow. Then I will turn to Senator Baucus, so that the two of us can restrain ourselves and get on to the next panel.

I think all of you made very fine contributions. I am struck with the observation, getting back to a point I had made earlier, that where you take an issue as complex as this and where you can get as distinguished people as the four of you are who have very differing conclusions on it, based upon your factual determinations and assessments, it does strike me that it is one of those things that is uniquely a legislative function to unravel.

I query whether courts and offices of education are better equipped to find that delicate balance. Sometimes they are well equipped where you can practically take judicial notice of something being so. However, where you need the power of investigation and determination and scholarly contribution and deliberation and evaluation, it does strike me we are in the concept of separation of power and perhaps we are more suitable to that particular task. I am not suggesting we are superior in individual wisdom, but I think our process lends itself to it more than the legislative and bureaucratic process.

Drs. Weinberg and Hawley, there are two things that nag a bit at me in hearing your testimony. On the philosophical level, it reminds me of Aristotle's observation that man is a social creature. Burke would come to mind, of course, in terms of the sense of community.

I almost wonder whether the behavioral sciences are not trying to bear a greater burden than they are equipped to bear in that you single out a variable—say, achievement, which I am not saying ought not to be considered. Of achievement, however, one might measure that and let that become the litmus test as to whether busing is or is not a good instrument of public policy.

To put it another way, in the Aristotelian sense, man is a social creature. We are men; we are whole; we have a sense of community. There are so many values, considerations, and variables that have to go into this sort of thing. For example, what is the tradeoff, even assuming there is for purposes of argument, in terms of time spent doing this and in terms of dislocation to families and what are the social gains to the children?

I know it is not intended, but I sometimes find in the rationale that black children must be attending white institutions that there is a certain patronizing attitude that anything which is all black we ought to be concerned about. We have distinguished black universities—Howard and Fisk. I have always felt that their products are of great quality, and I will continue to do so. In North Carolina, we have five black universities which have a strong tradition and a strong commitment from their alumni. I do not think the graduates of those institutions consider themselves as in some way or other having received an inferior education in that unless you can associate with white children and white institutions you are in some way neglected. It is a little patronizing, I think.

Frankly, as a matter of logistics, if one takes great Negro communities, like the District of Columbia or Harlem or Watts, or elsewhere, I do not know logistically how you can do it. It seems to me that the implications of your findings are that blacks who must have a substantial experience in the black community, be it schools or whatever, are in some way or other being deprived.

I just question that. We are whole persons. We do live in communities. We are not things. We are not examining Medflies; we are examining human beings and all of the complexity that suggests. In short, I find it frustrating to get the focus so narrowly upon "achievement" and IQ tests or performance tests. Even if it were all true, and I am demurring, I guess, I would want to know what are the tradeoffs. And are we looking at it in the broadest context of what man and people are like in society?

Let me rest my case there and just let you all respond concisely to that. Then I will turn to Senator Baucus.

Mr. **Hawley**. Mr. Chairman, I think you are quite right to say that we ought not to put all of our chips on one bet. The issue of achievement is only one dimension of what goes on in schools. We were asked to respond to the assumption that somehow achievement is negatively affected by desegregation. The testimony given here must seem contradictory to you. It goes back to my dog fight theory of social science where we end up saying "my evidence is better than yours."

You are quite right that we need to look across the broad range of findings. One of the things that has come from the achievement studies is the awareness that simply going to school with white children is not enough. That particular theory, which is called the lateral transmission of values theory, is now pretty much by the board. There is, instead, a more political theory about what is happening. That is that we are bringing into school systems some changes which will result in different kinds of programs and different kinds of behavior on the part of teachers and school administrators, partly as a function of the conflict that exists in that community.

In manifests itself in monitoring commissions and other activities which we might on other grounds feel would have unhappy consequences. The theory about the change has to do with reordering our priorities within those schools.

You are also quite right to say that, fundamentally, the issue really comes down to this: What will the impact of all this be on the ultimate racial equality and justice in the society. Our view, I suppose—at least my view—would have to be that we have not yet been able to achieve separate but equal schools in this country—not because of the educational issues per se, although that is arguable, but rather because to function effectively in an interracial society one has to have some understanding about what that takes, and that is hard to acquire in a separate environment.

Senator **East**. Dr. Weinberg?

Mr. **Weinberg**. Senator East, I welcome both your comments. I think they are very well put. I, too, believe that it is wrong to base our whole case on achievement.

As a working teacher for over 35 years, I can hardly accept scores on a couple of standard achievement tests as a sum of education. In my writings and research on desegregation, I deal not only with academic achievement but with the way the children get on with each other, the relation between the teachers and the children, and the role of the community—meaning the black and chicano communities as well.

As far as patronizing, I agree. That is a danger. I believe even in my own bailiwick over the years there has been some evidence of that. Recently I finished a study which has not yet been published dealing with the history of all-black schools in the United States as educative institutions—how well did they educate and who is it they educated?

The best research on this was done by Horace Mann Bond. In his last work—he died in 1973 at 69—the results of his study were published. I have tried to expand on them and find this: The black schools which functioned well—that is to say, had a relatively high level of academic achievement for the kids who attended—all-black children—generally tended to be middle class black schools and, by the way, not very well known. They were not especially in the big cities.

In fact, Dr. Bond said that by far the most successful all-black school was in Marion, Ala., in a rural area. It is not the urbanness of the school that makes much difference. However, he was unable to find, and I have been unable to find, all-black schools in the United States, either in the past or today—and I am talking about elementary and high schools—which are educating poor black children.

Unfortunately, whether it is North or South does not make much difference any more. The deprivation of black children and Chicano children is systematic. The schools they attend are inferior—not because black children are there and there are no whites—that would be patronizing to say that and insulting—but because the political authorities, including those people who run the school system, are not interested in educating black children. The result is that desegregation breaks up that pattern.

We need desegregation, therefore, not because black children need white children in order to learn. Of course not. They need desegregation in order to break up the pattern of privilege in our history which comes right up to the present and is nationwide. It is not just a matter of the South by far.

I was in Chicago 1 week ago. The pattern of segregation and deliberate deprivation is as powerful there as in any southern city you can mention.

Senator East. Senator Heflin, we certainly welcome you this morning. This is our first panel, and they are finishing up. We are getting slightly pressed for time. We have one other panel, and we are trying to wind up in the vicinity of 12:30.

We do welcome you. If you have a statement you would like to make, we would be delighted to hear that.

Senator Heflin. I do not believe I will have any questions of these gentlemen.

Senator East. Fine.

We certainly welcome you, and we appreciate your coming.

Senator Baucus?

Senator Baucus. Thank you, Mr. Chairman.

One thing that struck me during your presentations is that two of you feel fairly strongly that this bill makes sense and two of you apparently feel very strongly it does not.

Two of you feel that the data supports one view; two feel that the data supports another view. Why is that? You were not very close in reaching an agreement.

Mr. Weinberg. May I say that Dr. Walberg and I agree completely on the purely factual issue of whether or not under desegregation minority achievement is higher. The answer is yes.

I say that more times than not it is higher. He reports in 55 to 60 percent of the studies it is higher. I would say they are more or less the same statement, so we do agree on that very fundamental point.

Dr. Scott disagrees.

Mr. Hawley. If I may, Senator Baucus, Dr. Scott's testimony is peculiar, frankly. In Dr. Scott's testimony we are referred to newspaper reports, personal conversations, and the like and a conversation with a Nashville educator.

I live in Nashville. Scores he could have access to anytime he likes show that for the last 6 years there have been achievement gains of all children in the school system—minority children in particular in that school system.

It is very difficult to consider reviews of reviews and conversations and so forth as reliable evidence. That is perhaps one reason why we come to different conclusions.

Mr. Walberg's view, however, is a little bit different. On the one hand, the more rigorous research he has done, which is of national importance, on the characteristics of affected schools are things we should be doing in desegregation schools.

Mr. Walberg has not done studies of desegregated schools in the same format he has done the other.

He comes to the conclusion, if you will, that there is positive evidence in 60 percent of the cases. What if I say on the other hand that there are only 16 percent of the studies with negative outcomes? Anytime I can get a 4-to-1 bet, I will take it.

Senator **Baucus**. Dr. Walberg, do you have any comment to make?

Mr. **Walberg**. Just agreeing with several of the points that were made here.

I think that the research on the school factors, productive factors, and achievement really do add up. They are much less controversial, and we could look for them with great assurance.

What I had tried to do in my testimony is outline some of the controversy and ask if 55 percent or 60 percent is a good bet. It is not a good bet in comparison with, say, 98 percent of the studies that look at the amount of time students spend on homework.

There have been a great number of these reviews. I have tried to summarize all published ones even though I have not done a particular review on segregation myself. I have reviewed more of the other factors, but I have cited two syntheses of desegregation research. One was done at the Rand Corp. and one was done by Dr. Weinberg. Both agree that in 55 to 60 percent of the studies, there have been some positive benefits. Some of them have shown negative consequences.

I think there are some points of agreement between us.

Senator **Baucus**. Is it not true that since this is such a complex subject and because there are so many interrelated factors here, that it is not an either/or situation. Rather it is somewhere in between. I suppose it is a matter of judgment as to where in between the line is drawn.

You are saying that with respect to achievement the line is drawn at 55 percent rather than at 98 percent.

Mr. **Walberg**. Yes. I think you are quite right about that. There is a case of drawing the line there.

If you take 98 percent, that is almost a certainty.

Senator **Baucus**. Right.

Mr. **Walberg**. If students would spend more time on homework and they were to have a longer school day and if we could improve the quality of instruction, that is almost a sure bet. If you say 55 out of 100 cases, that is just about like flipping a coin.

Two major published substantial reviews have come to that conclusion.

In comparing the two, I draw some distinction between them.

Mr. HAWLEY. Why do you treat them as mutually exclusive?

Mr. WALBERG. I do not understand the question.

Senator BAUCUS. I am wondering if Drs. Weinberg and Hawley could tell me which of the findings in the bill you tend to agree with most?

Mr. HAWLEY. For my part, I think that finding five is probably true. Findings one, three, four, six, seven, and eight are not true. In the others, I think the evidence is mixed—in part, because the findings are stated in terms of qualifications, like a reasonable burden.

Senator BAUCUS. Could you tell me which ones you tend to agree with the most? Five is one. What else is there.?

Mr. HAWLEY. That is the only one.

Senator BAUCUS. Which ones do you disagree with the most?

Mr. HAWLEY. One, three, four, six, seven, and eight.

Senator BAUCUS. All right.

Dr. Weinberg, which one do you agree with the most?

Mr. WEINBERG. I follow Dr. Hawley's view. Perhaps I am a little more sweeping in my rejection of findings.

I have tried to indicate in the footnotes at the end the specific studies that led me to reject the particular findings.

I have represented different points of view and then come to my own opinion.

As I say in my conclusion, I do not accept the accuracy of any of the first nine. Nos. 10 and 11 are not matters of fact. They cannot be proven or disproven. It depends on what judicial philosophy or legal philosophy you might have.

Senator BAUCUS. Drs. Walberg and Scott, which ones do you tend to disagree with most?

Mr. WALBERG. I am sorry to say that I have not seen them.

Senator BAUCUS. You have not seen the bill?

Mr. WALBERG. No.

Senator BAUCUS. Dr. Scott?

Mr. SCOTT. I would subscribe to all elements of the bill, in the sense that I am presently favorably disposed to their feasibility.

Senator BAUCUS. Which one do you have the most trouble with?

Mr. SCOTT. I do not have trouble with any of them really.

Senator BAUCUS. By definition, there is one that you have to wonder about more than others, because there are 11 here.

Mr. SCOTT. I like seven particularly.

Senator BAUCUS. You like seven.

Mr. SCOTT. Yes.

Senator BAUCUS. Which one do you tend to have some problems with?

Mr. SCOTT. Let me say that I like six, too. I like five.

Senator BAUCUS. Is your like based upon data or your personal preference?

Mr. SCOTT. My like is based on my experience with children in classrooms.

I am convinced that this type of bill would begin to open opportunities for kids of all races and social classes.

Senator BAUCUS. There is no 1 of the 11 that you have any trouble with?

Mr. SCOTT. No. I especially like seven, because to me the purpose of schools is to educate. I think this is a particularly encouraging bill because it spells out some realities that have been long ignored.

Senator BAUCUS. Finding No. 3 states that segregation can be eliminated without such assignment and transportation. I wonder if any of you have any evidence to suggest that de jure purposeful segregation can be eliminated without busing.

Mr. SCOTT. May I comment on that?

There is a professor at Northwestern University who happens to be black. His name is Dr. Arthur Davis. He has developed a number of proposals for ways in which we can promote interracial harmony and break down the walls of racial misunderstandings through means which do not disrupt the educative process.

Senator BAUCUS. What are they?

Mr. SCOTT. Curricular procedures, methods of promoting intergroup exchange, and opportunities for community-related voluntary activities in which stereotypes can be broken down.

Dr. Davis speaks from a rich southern background.

While I am not able to spell out all the methods, I have participated in two seminars in which he has presented some of his views.

Senator BAUCUS. Can you cite any evidence where any of those methods have been undertaken and what the results are?

Mr. SCOTT. No. I can only say that they made a good deal of sense to me.

Being familiar with the consequences of busing, I would hope that we would begin to explore alternatives, such as those of Dr. Davis.

Senator BAUCUS. The reason I ask the question is because finding No. 3 says that they do work. That would suggest that there is evidence to that effect. I am trying to find out what the evidence is that methods other than busing do in fact work.

Mr. HAWLEY. The particular proposals which Professor Scott articulated would not result in desegregation. They might result in better human relations, although there is some evidence that that kind of strategy would not be effective.

The question you raise is essentially a logistical one, as I understand it.

We have problems of racial separation by residents. If we are going to achieve racial integration in most of our communities, we cannot do it without some measure of busing. Busing should be a last resort. I think almost all scholars and judges agree with that point of view.

The fact is that the Supreme Court has concluded time and time again, as have appellate courts, that having reviewed efforts to desegregate without busing that busing is the only alternative that substantially eliminates racial isolation in some communities.

Senator BAUCUS. I understand that. I think also it should be employed as a last resort. I do not think anybody likes it.

The question is what other methods are available.

Many people say that there are other methods. I would like to know what they are and how well they have worked.

I think we would all like to find some other methods.

Mr. Hawley. Sure.

Senator Baucus. We have to honestly ask ourselves what they are and whether they work.

Mr. Weinberg. Senator Baucus, to my knowledge there has not been a study made to discover what percent of all desegregation can be attributed to busing.

I remember in 1975 or 1976 a national study group looked into ESAA—the Emergency School Aid Act.

On the basis of the grant applications from thousands of school districts in the country, the most frequent technique of desegregation used in those districts was changing of attendance boundaries between individual schools.

The second most frequent was busing. Of course, in a number of districts they used both.

In some, they used only one.

Change of attendance boundaries can only work in the absence of busing if you are talking about two schools which are relatively close to each other—one all white and one all black. It is pretty easy to pair those and settle the problem that way.

Where you have residential segregation on a large scale, and you have it almost in every city in the North and South, busing would seem to be the only practicable way of meeting that part of the problem.

There is much desegregation being achieved today without busing but only under certain restrictive conditions. Those restrictive conditions do not include residential segregation.

I might say that 20 years ago I was against busing. I felt that mandatory busing was artificial in the sense that the most sensible way to solve the problem was to integrate the neighborhoods. I still believe that way.

I have yet to find school people who choose or prefer busing or would like busing on principle.

It would make much more sense to have integrated housing, so that the neighborhood schools could be integrated schools. It took me only a short time to realize that fact.

Until we integrate housing in the neighborhoods, there is no other way to overcome residential segregation.

Senator Baucus. I suppose that one of the problems here—and I have no direct personal experience, so this is a somewhat difficult area for me—is the manner in which a community handles a desegregation order. I am wondering if that has large bearing on the community's reaction to an order.

It seems to me that, hypothetically anyway, some communities might approach it with good faith and others might not. That factor may have a large impact on the effectiveness of a plan.

Mr. Walberg. I would like to respond to your comment and your earlier question as well.

It seems to me that to put the case as busing is misleading. I think that the essential thing that people and students and educators have difficulty with is the compulsory and mandatory nature of it, which I think you were speaking about.

I think there are plenty of examples of plans that might be decades old—some are quite recent—where you have a voluntary system where the schools are made attractive enough so that you might have black, white, and Hispanic students who come to a school with a special feature, such as photography.

To give an example, there is Jones Commercial High School in Chicago where students who are interested in that particular feature of the school can come from all parts of the city. How they get there is up to them. In most cases, they may choose to go on a bus, and that is perfectly reasonable.

Senator BAUCUS. This is the magnet concept?

Mr. WALBERG. Yes.

There is a voluntary characteristic about it so that black, white, and Hispanic students can be given the choice to go wherever they like.

There is a counterargument to that. In many instances where those programs are available, not all students avail themselves of it, so they do not actually go there.

It is probably true, and I think most scholars would agree, that there are a substantial number of parents who want to have their children in neighborhood schools and they do not want the bus to cross a large city like Chicago or in other instances.

It is very difficult for a voluntary plan to get those students to go to those schools. You have to mandate it, and you have to make it compulsory.

Students have a choice about this and families have a choice. I know that you are going to be talking about white flight later in the hearings.

One of the things I am extremely worried about in mandatory or compulsory Federal initiatives is that it is not so much a case of separating whites and blacks, but it is a concentration of poor students in the schools.

When people are compelled to do something, those who are more wealthy have a choice to move to the suburbs or to send their children to private schools or parochial schools.

This is the thing that worries me about that.

I think, if anything, the voluntary plans have worked reasonably well for parents and students who have those kinds of interests. They do have the tradeoff that it does not produce the kinds of statistical mix that some people may want.

Senator BAUCUS. When you say "work reasonably well," what does that mean?

Mr. WALBERG. That means to say that you will find children of various ethnic groups from different parts of a large city going to that school on a voluntary basis.

Senator BAUCUS. How significant a percentage change can that approach effectuate?

Mr. WALBERG. In some schools that are made attractive enough—for example, the Walt Disney School in Chicago and other high schools that have very attractive programs—the school authorities can set quotas.

I helped design a program for such a school in Chicago where you say we are going to have 30 percent in this group and 40 percent in this group and 20 percent in another group. You can only admit students up to that particular quota, but they are all there because they want to be there.

Senator BAUCUS. What do the studies show with respect to the percentage change in composition?

Mr. HAWLEY. When the minority population of a community exceeds 25 to 30 percent, the chances of achieving anything more than 2 or 3 percent difference in racial balance or increasing what we call the dissimilarity index for the amount of interaction is very, very small.

San Diego, for example, has an elaborate program. They seem to have increased the amount of racial interaction through that voluntary plan by about 1.5 or 2 percent.

The answer is that it depends on the socioeconomic characteristics of the community and the population size.

I think magnets are a good idea. There is a lot of good reason to do them. We spoke to that here. However, as a way of achieving substantial desegregation in the communities, about which there is much conflict about it, it is not a viable strategy.

Senator BAUCUS. Assuming we want to have desegregated schools—and one might quarrel with that assumption, but for the moment let us take that assumption—what other remedies, other than busing, are available and make the most sense, if any?

You are the experts—all four of you. We are obviously trying to find various remedies that are the least disruptive and the most agreeable, or the least disagreeable. What are they?

We have talked about a voluntary system, about magnet schools, and about the redrawing of district lines.

I am just curious—I doubt there is a consensus among you, and if there is that is terrific—but what do you suggest we do? What remedies other than busing do you suggest make the most sense?

Senator EAST. May I just intervene for a moment? I do it with great reluctance.

I have four other panelists who have come from great distances. I hate to dismiss their testimony today.

I wonder, Senator, if there is any way I might let those good people come up here and get in their oral statements.

I think your questions are very good and pertinent, but I wonder whether we might come back to that. I will not be able to get them back in town, and it troubles me they have come this distance.

I simply implore the indulgence of all concerned if we could extend that courtesy to them to let them have their brief day in court here before we totally exclude them.

Senator BAUCUS. I understand, Mr. Chairman. I wonder if we could just finish up this line of questions which is on remedies, because I think it is a critical point.

Senator EAST. I think it would be an excellent thing for them to put in writing their answers, and they could give it greater reflection.

I just regret as chairman that I am somewhat in an awkward bind here of trying to accommodate everybody. We probably tried to do too much, so I apologize for that.

Being caught in this tight bind, I hate for the good folks who have come for the second panel to be totally bumped this morning. I am afraid that is what we are careening to right at the moment.

Senator BAUCUS. I understand. If you will allow me, Mr. Chairman, to just take 5 minutes and no more, I think we can finish.

Senator **Heflin**. Could I just ask them to do something in writing that I think maybe the group as a whole might help us a little on?

I know this from my observation in Alabama that the Alabama students have taken the California standard achievement test for a number of years. Basically, it is a test that originally, about 10 years ago, involved verbal skills, mathematics, and reading skills.

I think those tests involve some other additional subjects that have been added.

Comparison of from 1970 to the present time in those tests, from selected areas of the State—I notice Dr. Hawley in his testimony mentions that the youngsters from the Southeast, clearly the most desegregated area, have shown increases in test scores.

I understand that California test is standardized and is given to every student in the United States—I may be wrong about that, but it was at one time—to take that type of test and to have some sort of sampling of various States and regions and reactions from them. I wonder if that could be done.

Senator **Baucus**. If the Senator would yield, I have to be upstairs for a markup in about 5 minutes. They were answering some questions.

Senator **Heflin**. I would just ask them to do it in writing. I am through.

[Responses of witnesses to questions of Senator Heflin and Senator East follow:]

December 1, 1981.

Dr. Ralph S. Scott, Jr.,
University of Northern Iowa, Cedar Falls, Iowa

Dear Dr. Scott: I appreciated your taking the time to appear as a witness for the Senate Judiciary Subcommittee on Separation of Powers and giving your testimony on the subject of busing. As I indicated at the hearing, I would like thoughts on the following question for your answers in writing.

It is my understanding that the California Standard Achievement Test is administered to many public school students in the United States. This test originally involved verbal, mathematic and reading skills, although it may now involve a few more subjects.

Dr. Willis Hawley, Dean of Peabody College at Vanderbilt University, has testified that youngsters from the South East have shown an increase over a period of time corresponding in test scores. These children attend schools in clearly the most desegregated areas.

I am interested in obtaining a sampling of test scores in various states and regions and your interpretation of the data in light of the desegregation experience of these states and regions.

Your response may be addressed to James P. McClellan, Chief Counsel, Senate Judiciary Subcommittee on Separation of Powers, 8-A Russell Senate Office Building, Washington, D.C. 20510.

Thank you for your assistance in this matter. Your insight will be very helpful to the Committee in making its determination on busing policy.

Sincerely yours,

Howell Heflin.

University of Northern Iowa,
Cedar Falls, Iowa, December 22, 1981.

James McClellan,
Chief Counsel and Staff Director, Subcommittee on Separation of Powers, U.S. Senate, Committee on the Judiciary, Washington, D.C.

Dear Mr. McClellan: Senator Howell Heflin (Alabama) has asked me to submit to you information concerning the reference Dr. Willis Hawley made during our September 30 testimony (concerning the relationship between busing and school achievement) with respect to alleged achievement gains of children in the largely desegregated public schools of the southeast, and I am pleased to do so. Prior to responding to you I wrote to Dr. Hawley. He indicated that his conclusions are drawn from the following two sources:

1. Forbes, Roy H. "Test Score Advances Among Southeastern Students: A Possible Bonus of Government Intervention," Phi Delta Kappan, January, 1981, pp 332+. In my opinion, the data submitted here are not convincing, and fail to demonstrate any relationship between desegregation and improved achievement. Dr. Forbes himself, for example, notes that the data are cross-sectional and for this and for other reasons "no causal relationships should be directly inferred from the data." (p. 334) Also, while Dr. Forbes does advance the possibility that desegregation and compensatory education programs might have produced the (reported) gains, he goes only so far as to claim that desegregation did not have a negative effect on the educational attainment of Southeasterners, white or black. He does not claim that his data support the thesis of a desegregation-achievement gain linkage.

Moreover, the summary table (p. 334) indicates that, on the measures used, Reading scores advanced 1.2, but Mathematics scores and Science scores declined 1.3 and .8 respectively. This, of course, produces a total negative trend, as is further demonstrated on Table 6 of page 334. Thus the optimistic title of the article seems inappropriate. I have other questions about the article, but our library has been unable to establish Dr. Forbes' whereabouts. I am writing to the journal (Phi Delta Kappan) and if more relevant information becomes available I will again be in touch with you.

I should like to ascertain from Dr. Forbes why, if the overall national achievement trend is generally down, and the trend for the southeastern area up, selective migration has been ruled out. I should also like to have the name of the test, its reliability and validity, the number of black and white children selected, how they were selected, conditions of testing, family background information on the children from whom the data were drawn. Moreover, Dr. Forbes notes that "newly developed exercises were administered," and it seems possible that in later years new items were added, which would have affected norms and the subsequent interpretation which should be given the data.

2. Crain, R. Mahard, R. "Desegregation and black achievement: A review of the research. Law and Contemporary Problems," 1978, vol. 42(3), pp. 17-56. I have reviewed the evidence presented by Crain-Mahard on pages 104-107 of the enclosed book "Black Achievement and Desegregation: A Research Synthesis."

Summing up, I have reviewed the evidence upon which Dr. Hawley based his conclusions, and remain unconvinced that he presents any evidence that desegregation promotes learning. Because busing is a national problem, and because policy should be based on facts, I would be willing to appear jointly with Dr. Hawley and discuss before the Senate Subcommittee on Separation of Powers precisely why the facts, as I read them, do not support the view that desegregation has produced achievement gains in the southeastern section of the United States.

I hope that this information will be helpful to you and members of your Subcommittee, and am taking the liberty of sending a copy of this letter to Senator Heflin, whose interest in quality education I greatly appreciate.

Sincerely,

RALPH SCOTT,
Ph.D., Director, Educational Clinic.

Encl: Black Achievement and Desegregation.

UNIVERSITY OF NORTHERN IOWA,
Cedar Falls, Iowa, January 25, 1982.

JAMES MCCLELLAN,
Chief Counsel and Staff Director, Subcommittee on Separation of Powers, U.S. Senate, Committee on the Judiciary, Washington, D.C.

DEAR MR. MCCLELLAN: Shortly after my December 22 letter to you I wrote to Dr. Forbes who conducted one of the two studies to which Dr. Willis Hawley referred in his testimony concerning alleged achievement gains of children in the largely desegregated public schools of the southeast. I asked Dr. Forbes a number of specific questions concerning his study but in response he sent me two large publications, funded by the National Institute of Education, which would take months to adequately assess. My questions were specific and it is my opinion that his response reveals a preference to not respond to the precision-point questions I asked him. Over the years I have found this a popular strategy of "pro-busers": delay, obfuscate. In the meantime, poor and minority children must suffer from the adverse circumstances of busing.

In his (January 15) letter, Dr. Forbes states only that he concluded that desegregation and compensatory education programs "did not negatively impact on the educational attainment of Southeasterners, White or Black." This I find unconsoling: if the discomfort associated with, and the billions of dollars spent on, busing and compensatory education do nothing more than not make things worse in our schools then such endeavors should be abandoned. "Junked" might be a better word. After all, it is well established that Black and poor children suffer most because of inflation and higher taxes, both factors associated with busing and compensatory education.

I would appreciate it if you would be so kind as to route this reply to Senator Heflin. His interest in quality education for children of all races is much appreciated, and if he or you have further questions please let me know. I do have one suggestion: perhaps NIE might be invited to grant a research award so Dr. Forbes' data tapes might be reanalyzed.

Again, thanks for your help and courtesies.

Sincerely,

RALPH SCOTT,
Ph.D., Director, Educational Clinic.

December 1, 1981.

Dr. MEYER WEINBERG,
Director, Bond Center for Equal Education, University of Massachusetts, Amherst, Mass.

DEAR DR. WEINBERG: I appreciated your taking time to appear as a witness for the Senate Judiciary Subcommittee on Separation of Powers and giving your testimony on the subject of busing. As I indicated at the hearing, I would like thoughts on the following question for your answers in writing.

It is my understanding that the California Standard Achievement Test is administered to many public school students in the United States. This test originally involved verbal, mathematic and reading skills, although it may now involve a few more subjects.

Dr. Willis Hawley, Dean of Peabody College at Vanderbilt University, has testified that youngsters from the South East have shown an increase over a period of time corresponding in test scores. These children attend schools in clearly the most desegregated areas.

I am interested in obtaining a sampling of test scores in various states and regions and your interpretation of the data in light of the desegregation experience of these states and regions.

Your response may be addressed to James P. McClellan, Chief Counsel, Senate Judiciary Subcommittee on Separation of Powers, 8-A Russell Senate Office Building, Washington, D.C. 20510.

Thank you for your assistance in this matter. Your insight will be very helpful to the Committee in making its determination on busing policy.

Sincerely yours,

HOWELL HEFLIN.

UNIVERSITY OF MASSACHUSETTS
Amherst, Mass., December 21, 1981.

Mr. JAMES P. MCCLELLAN,
Chief Counsel, Senate Judiciary Subcommittee on Separation of Powers, 8-A Russell Senate Office Building, Washington, D.C.

DEAR MR. MCCLELLAN: I am responding to Senator Heflin's letter of December 1st in which he writes that "I am interested in obtaining a sampling of test scores in various states and regions and your interpretation of the data in light of the desegregation experience of these states and regions."

Unfortunately, such an array of test scores is not presently available. A number of states do collect academic achievement scores regularly or occasionally but they are not usually arranged by either race or desegregation experience. Some southern states do report achievement scores by race. Regional figures on a racial or desegregation basis are just not available, other than the data commented on in Dr. Hawley's testimony.

In order to make a valid comparison between states and/or regions on racial and desegregation differentials, there would need to be a far more uniform distribution of races and desegregation experience than presently exists. A barely-desegregated, almost wholly white Iowa cannot be compared with Alabama or almost any other southern state. On the other hand, Florida could be compared with Illinois, as both are comparable in racial composition, although not in desegregation experience. This assumes both states used similar tests of achievement.

All this could be done quite readily but Senator Heflin is one of the few persons interested. I would be pleased to cooperate with other researchers in doing such a study if the means were available.

All this being true, we are left with achievement scores on a city-by-city basis. Sometimes these exist over a long period. (Such is the case in the enclosed report on Berkeley, California, reprinted from *Integrateducation* magazine.) Many school systems have similar data but ordinarily do not publish them. This, too, needs to be done. With the National Institute of Education's budget under great pressure, it is difficult to imagine other sources for support for such a study. Our Center has reports from scattered cities but not staff to bring them together.

I appreciate your interest in this issue and am pleased to cooperate with you.

Sincerely yours,

MEYER WEINBERG, *Director*.

Enclosure.

Berkeley, Still the Capital of Desegregation

Laval S. Wilson

Introduction

The Berkeley, California, public schools (BUSD) make a claim that few others in the country can match—it is a successfully desegregated and integrated district. In September 1968 the historic two-way busing program began. Berkeley's goal was to bring together young people of diverse backgrounds from segregated neighborhoods into a desegregated school setting.

After 11 years, the single most important statement that can be made concerning the Berkeley experience is that it has been very successful. Desegregation works in Berkeley! Busing works in Berkeley! Students of all ages, preschool through adult school, come together to receive a high quality educational program in a desegregated setting. More importantly, there is no diminution of commitment to continue this fine program by the community or the board of education.

Approximately 50 percent of all elementary school students in Berkeley are bused every day. The busing of minorities and whites has been a successful experience for our students, test scores of minority and white students have increased since the start of the desegregation decision, and there is no discernible white flight from the Berkeley schools.

It is important to state that this article is not a plea for other districts to emulate Berkeley. No comments are made on the success or failure of busing in Texas, Ohio, Illinois, New York, or any other state. Based on the negative attitude, ethnic mood, and population in some communities, school officials should not waste one ounce of sweat attempting to make desegregation and integration work.

It is also important to state that Berkeley is not a trouble-free school district. We have our share of normal school district problems. Although the Berkeley Unified School District (BUSD) has had problems with its central kitchen lunch program, the loss of local override tax support because of the passage of Proposition 13, a 1975 teachers' strike, and the implementation of the various special education regulations, its desegregation program is still on track.[1]

The Berkeley Community

What type of community is Berkeley? First, it is unique. Second, it provides the opportunity for people who are diverse to be accepted as normal. Most urban-suburban communities do not really encourage wide perspectives of opinion, dress and lifestyle among its citizenry. And few communities expect participatory democrary to be the accepted method of its people doing business with a school board, city council, and other governing institutions. Conservatism and not liberalism seems to be the present mood of the nation concerning school integration issues. A recent *New York Times* article entitled "Whites Grow Reluctant to Back Integration Steps" frankly analyzes the disenchantment of many communities with the notion of racial justice programs.[2]

Although social prejudice, racial discrimination, political power plays, and elitism are indeed evident in this Bay Area city, Berkeley is indeed an anomaly. Irrespective of your politics, level of education, ethnicity, income, morals, habits, or aspirations, you will find in Berkeley a considerable number of people just like yourself. More importantly, Berkeley citizens believe that people have a right to be themselves without any stigma or social eccentricity being associated with individual behavior. The only restriction is that one's own personal behavior should not negatively restrict the milieu of others.

Demographic Information

Berkeley is a medium-sized university city in the center of the San Francisco Bay Area of Northern

California. Its 1970 population of 116,700 was 62.2 percent white, 23.5 percent black, 7.4 percent Asian, 5.5 percent Chicano, .3 percent Native American, and 1.1 percent other. According to the Jewish Welfare Federation of the Alameda and Contra Costa Countires, a considerable Jewish population resides in the city. Also represented are many nationalities and a wide variety of religious sects.

A large proportion of Berkeley's population is students. The University of California alone serves more than 29,000 students. That university is the city's largest employer, providing work for about 11,771 full and part-time staff, representing one-sixth of the total number of people employed in the Berkeley area. Berkeley also houses over 300 manufacturing plants, providing employment in light industry for residents of Berkeley and the greater Bay Area.

In November, 1979, the BUSD K-12 enrollment was 10,611 students. There were 45.1 percent white students, 43.3 percent black, 6.4 percent Asian, 4.5 percent Chicano, .2 percent Native American, and .5 percent other.

By contrast, in 1939, Berkeley was a homogeneous white community as was its public school system. Only 4 percent of that year's enrollment was black. The other racial minorities were not counted. By 1964, on the eve of the secondary school desegregation program, Berkeley had become one of the most racially diverse small cities in the nation, ready, with sufficient push from its minority communities, to voluntarily desegregate its public schools.[3]

The Berkeley Plan

The Berkeley schools are organized into a K-3, 4-6, 7-8, 9, 10-12 grade configuration. The secondary schools were reorganized in 1964 as the first phase of the district's desegregation plan and the elementary schools were organized into the present configuration in 1968. It was this later phase of the design which received national acclaim. Berkeley became the first community of over 100,000 population voluntarily to desegregate its schools.

The community was and still is basically segregated in its neighborhood housing patterns. The major housing distinction has frequently been dubbed "the hills" and the "flats." Most of Berkeley's white population live in the more expensive hill section of the community while the majority of Berkeley's black, Chicano and Asian populations live in the flat section of the city. The distinction between these two areas is strictly economic.[4]

All except two of Berkeley's 12 K-3 schools are located in the hill area. All four of the 4-6 schools are located in the flat section. The unique cross-busing program provides the opportunity for white students living in the hill area to be bused to 4-6 schools in the flatlands. Minority students are mostly bused from the flatlands to the K-3 schools in the hills for that phase of their educational programs.

The entire city is divided into four zones. Each zone includes one 4-6 school and two to four K-3 schools. The busing plan allows students to attend a K-3 and 4-6 school within the same zone. The four attendance zones are then paired to serve as the attendance areas for the two 7th and 8th grade junior high programs. All Berkeley students receive their 9th grade education at a facility called the West Campus of Berkeley High School (BHS). The BHS campus houses all 10th to 12th grade students.

The entire Berkeley desegregation plan has operated as originally designed since 1968 without any modifications except for a recent temporary housing adjustment for some 7th-, 8th-, and 9th-graders. This arrangement was necessitated by the reconstruction of one of the junior high schools in order to meet the state earthquake standards.

The Quality of the Berkeley Plan

The general goal of the 1968 BUSD plan was of course to desegregate the schools. In addition, the global concept called for the following:

- Educational excellence for all students
- Improved understanding of cultural differences
- Elimination of racial barriers
- Equality of opportunity for all Berkeley children
- Preparation of the next generation for living in a changing environment.[5]

A major hope of the minority community was that desegregation and integration would provide academic and program parity between minority and white youngsters. In contrast, a concern voiced by white parents during the mid-60s was a fear that desegregation would stifle the achievement of their youngsters.[6]

After 11 years of desegregation, the desires of minority parents and students have been fairly well realized in the area of program parity in the elementary schools and some success has been realized in improving the academic skills of minority youth. The fears of white parents have not materialized if the criteria of program offerings, the results of state and national achievement tests, and university acceptance of Berkeley graduates are utilized to measure the quality of the District's program.

Reading Scores

It is clear, from an analysis of the data, that after 11 years of desegregation, the mean grade reading scores of Berkeley Asian, black, Chicano and white students have all improved. This is by itself a very significant and important sign. Academic success and a concern for the basics have been national priorities of parents and educators during the last five years. The fact that the scores of Berkeley students have continued to rise destroys the myth, at least in this one community, that desegregation reduces the opportunity for achievement for white students while benefiting blacks.

The national controversy over desegregation and busing has been associated primarily with blacks and whites. Although the Berkeley student population is composed of a number of different ethnic groups, a description of the achievement progress of students in this article will be limited to blacks and whites. These two groups represent approximately 88 percent of the district's 1979 student population. In addition, the main purpose for the article is to explore the impact of the Berkeley program on black and white students and their parents.

Table I is a comparison of the achievement scores of white and black Berkeley students in 1967 and 1979. The scores of 1967 students are used in Table I. This provides an analysis of the scores one year before the 1968 BUSD plan was initiated. Although the reading scores of white and black students have increased since the time that the desegregation program was implemented, differences between the two ethnic groups still exist.

An analysis of the scores of 5th-graders demonstrates the gain in reading of both black and white students, even though the gap between the two groups at that grade level has continued to increase. Since the Table I test data is derived from the Spring testing programs, the grade level equivalent norm for 5th grade students would be the eighth month of the 5th grade.

In 1967, the year prior to implementation of the two-way busing program, the mean grade level equivalent score for white students was 6.9. This represents one year and a month above the national norm for 5th-graders. In comparison, the mean grade level equivalent score for white students in 1979 was 8.3. This represents an increase in the grade equivalent score of one year and four months and a total difference above the norm of two years and five months. These are impressive scores for 5th grade students in any district.

In 1967, the mean grade equivalent score for black students in the 5th grade was 4.4. This indicates that black students were one year and four months below the national norm for 5th grade students. In comparison, the 1979 score of black students in the 5th grade was 5.4. This is an increase in the mean grade equivalent score of one year. Although black students gained one year in the mean grade equivalent score, they were still four months below the national norm and were substantially below white students at the same grade level.

Much has been written about the general decline of achievement test scores of students throughout the country. Although the Berkeley district continues to be concerned about the gap between the achievement scores of black and white students, the data clearly indicate that white and black elementary students have improved in the area of reading since the initiation of the 1968 desegregation plan.

Longitudinal test data for Berkeley secondary students from the mid-60s until the early 70s was not consistently collected and summarized by the district. The 1973 scores are probably the most appropriate to use for comparative purposes for 9th- through 11th-graders.

Seventh and 8th grade white students continued to score higher in reading during the six-year period from 1973 to 1979. The highest score that can be obtained on the Comprehensive Test of Basic Skills is 13.6. As can be seen in Table I, white 9th, 10th, and 11th grade students topped out on this test in 1979.

The reading scores of black secondary students have also continued to go up. Black secondary students, except for 7th-graders, have made substantially better progress in reading in the six-year period following 1973 than black elementary students have achieved since the beginning of integration in 1968. Although the gains in grade equivalents have been higher for black secondary students, those scores are still below the national norm. The gap between black and white secondary students is also very much in evidence.

The main message to be derived from the analysis of the Berkeley program is that reading test scores have increased since the desegregation program was initiated. Black students' scores have increased and white students' scores have continued to rise.

It is not the purpose of this article to attempt to analyze the reasons for a continuation of a gap between the two ethnic groups. The staff, board, students and parents are all very concerned about this problem and the staff has intensified its remediation program to increase the scores of black students to a higher level. For the last three years the use of an articulated, skills-based, districtwide reading curriculum has provided promising results.

It should be made clear, however, that Berkeley is a university town which has a very highly educated population. The white students attending the Berkeley schools are atypical of the white students scaled on most standardized tests. The community has attracted intellectuals from all over the world and the level of education of adults, as well as children, is considered to be extremely high.

Cross-busing of white students to predominantly black communities for their 4-6 grade experiences and the busing of black students into predominantly white communities for their K-3 grade experiences has not had a negative impact on the mean reading achievement scores of either ethnic group. In fact, the reverse has occurred. The scores of black and white students have increased since the Berkeley program has been implemented. Again it is important to note that this analysis focuses just on the academic success of the two ethnic groups associated most frequently with desegregation efforts across the country

SAT Scores and National Merit Scholarships

The Scholastic Aptitude Test (SAT) is one of the major criteria used by universities to screen entering freshmen. Over one million high school seniors took the SAT during the 1979 round of testing according to reports of the College Board. A recent analysis of the Verbal and Math SAT scores of the 1978-79 class indicates that the national decline in SAT scores continues.[7]

Although the total scores of Berkeley students have also dropped over a period of time, BUSD students still score well above the national average. Table II is a comparison of the mean SAT scores of Berkeley students to those of students across the country. The year prior to the desegregation of the elementary schools, Berkeley 12th-graders scored 58 points above the national average on the Verbal and 50 points above the national average on the Math.

A comparison of SAT scores for the 1978-79 year provides similar results. The current 12th-graders scored 57 points above the national average on the Verbal and 52 points above the national average on the Math.

The BHS class of 1979 achieved a national status few schools will ever reach. Forty-one of those graduating seniors became semifinalists in the National Merit Scholarship competition. No other single high school west of the Mississippi matched BHS's number of semifinalists.

Only two high schools in the country placed higher than Berkeley. One was the exclusive Phillips Academy, located in Exeter, New Hampshire, with a student enrollment of 965. The other was New York's Stuyvesant Academic High School. Both of these schools had 53 semifinalists.

Such powerful indicators concerning the academic capabilities of students graduating from BHS is a persuasive indication that the academic quality of instruction has not been reduced in this Bay Area community since the cross-busing program was initiated back in 1968. Test scores are only one indicator of the quality of a district's instructional program. Frequently, however, test scores are used by the critics of desegregation to demonstrate the negative impact of busing, magnet, or cluster programs, as well as other organizational concepts utilized to foster desegregation.

Many school districts which have desegregated cannot demonstrate the test scores of their students to the public with such dramatic success. Berkeley is indeed fortunate that the excellence of its instructional program and the dedication of its teaching staff have remained at such a high level.

Program Parity

In the K-3 and 4-6 schools, all students are exposed to the same educational program. Classrooms are heterogeneously grouped to ensure balance in sex, ethnicity, interest, and achievement. Since 1968, it would be very difficult to differentiate schools in Berkeley on the basis of curricula quality, the instructional materials, or the general quality of teaching. General program parity exists for all of our elementary students. The only differentiating characteristic among the elementary schools would be the type of special funding received. Berkeley participates in a number of state and federal programs: Title I, Follow Through, Emergency School Aid Act, and the California School Improvement Program, to name a few. All schools participate in one or more of these special projects, benefiting our students beyond what could be provided from normal local tax and state financial resources.

The course offerings at the high school are quite extensive. For example, students have the opportunity to take four years of French, Latin, German, or Spanish, culminating in senior seminars, and the school has a three year Swahili program. Advance Placement courses are available in Latin, Physics, Chemistry, Sociology, Calculus, English Literature, and Modern American Literature. The students self-schedule their classes in a manner similar to the procedure utilized in many universities.

Parity between the individual programs of black and Chicano students in comparison to those of Asians and white students in our secondary schools, however, still does not exist. Although BHS attracts gifted students of all ethnic groups, blacks and Chicanos are underrepresented in the Advance Placement classes and some of the subject offerings which require a reading level of Grade 13. Prerequisites are also another restriction. In order for a student to take Calculus, a year of Trigonometry is needed. It has a prerequisite of two years of Algebra and a year of Geometry. Most of our able black and Chicano students have not opted to take the more rigorous science classes or their reading and math scores tend to be lower than recommended by the department staffs.

In order to provide for more equal access to the more esoteric and technical offerings of the high school, the district has created and cooperated with other agencies in the implementation of a number of programs designed to achieve parity. In partnership with the UC-Berkeley campus, BUSD has, for a number of years, participated in the Math, Engineering, Science Achievement (MESA) program. MESA is specifically designed to assist students, generally minority, not only to choose some of the more difficult high school math and science classes, but to offer tutorial assistance which enables students to succeed in the classes and obtain passing grades. In addition, Berkeley has established its own Mentally Gifted Minors Program, called The Berkeley Plan, for able students. Participants in California's Mentally Gifted Minors Program (MGM) are required to score at or above the 98th percentile on an individual test of intelligence. A disproportionate number of state MGM students are white.

Entry into The Berkeley Plan is by teacher and counselor recommendation. The majority of The Berkeley Plan students are black. Through the use of The

Berkeley Plan, MESA, and other projects specifically designed to assist minority Berkeley students to participate successfully in the more advanced curricula offerings, some progress is being made to decrease the disparity in the secondary programs between black and white students. Similar to the progress of minority students in reading, improvement is observable in program parity in the more advanced secondary class offerings, but the pace is not as rapid as the district would like.

White Flight

The decision to desegregate a school district is sometimes the catalyst for whites to leave a community. If white families do not move from a community, their youngsters are sometimes removed from the public schools and are enrolled in private non-sectarian or parochial schools. After the Berkeley board decided voluntarily to desegregate its elementary schools in 1968, some white parents did indeed remove their youngsters from the public schools. The numbers were not great, however, as can be observed from the data outlined in Table II. From 1967 to 1968 the change in the white population was 3.8 percent. Very little change has taken place in the overall district percentage of white or black students since the desegregation plan was implemented. In 1968, the district's white student population was 46.2 percent and in 1979, that population was 45.1 percent. In that 11-year period, the decline in white students was only 1.1 percent in relation to the district's total population. Black students were 42.8 percent of the district's population in 1968 and were 43.3 percent in 1979. This represents a black student increase of only one half of a percentage point.

Table III vividly shows that the overall Berkeley student population has been fairly stable over a number of years. It is true, however, that fewer black and white students were enrolled in the district in 1979 than in 1967 or in 1963. In fact, the table includes 1963 population data just so that an historical perspective of student enrollment can be understood.

By including information from 1963, which was five years prior to the elementary desegregation plan approved by the board and one year prior to the approval of the secondary desegregation plan, the evidence is rather conclusive. The districtwide BUSD racial population has been historically stable and a gradual decline in student numbers has been taking place in BUSD for some time. Although a 3.8 percent decline in white students is observable from 1967 to 1968 in Table III, this information is not as significant as it might at first appear. Until 1968 Chicanos were counted as white. With the establishment of this group as a separate census entity, 3.4 percent of the 3.8 percent white student population in 1968 is accounted for. In other words the district census figures illustrate that the overall population decline in Berkeley has been a slow and normal population decline.

The important fact observable from the data presented in Table III is that the Berkeley desegregation plan has not caused white flight, black flight, Asian flight, or Chicano flight. The racial percentages of the district's total student population have changed very little from 1968 to 1979.

Site Boundary Changes

Although the total racial population of the student body has remained stable, some adjustments need to be made in the attendance boundaries of the various K-3 and 4-6 schools after 11 years. The elementary school busing program was originally designed to racially distribute and balance students throughout the district. Some students living in designated neighborhoods walked to an assigned school while others were bused to the same site.

The 1968 plan stipulated that the percentage of black students enrolled at any site should not be greater or less than 5 percent of the group's districtwide proportion of black students' ethnic average. As an example, blacks were 41.3 percent of the district's population for the 1967-68 year. Theoretically, the percentage of black students assigned to any school, therefore, should not have been greater than 46.3 percent or less than 36.3 percent. In practice, variances in some of the ethnic percentages did exist.

Over the 11-year period, the population mix at some Berkeley schools has varied to a greater degree than desired. During the 1968-69 year, the student population at Cragmont K-3 was 40 percent black and 51 percent white. The 1979 figures were also 40 percent black and 51 percent white. No change would be needed for this site. In comparison, the 1968-69 population for Emerson K-3 was 48 percent black and 48 percent white. Presently, the district census indicates 53 percent black and 39 percent white. Applying the 5 percent deviation standard to the 1979 enrollment at Emerson means that the black students are 5 percent over the allowable variance. On the other hand, white students at that site would be only 4 percent underenrolled.

The adjustments needed in most schools will be minimal. Several schools will probably need substantial boundary modifications. But, after 11 years, the plan does need a bit of fine tuning. Realignment of all of the boundaries took place in time for the opening of school in September of 1980. Not only did a parent, student, staff committee make recommendations to the district about attendance zone changes, the group also undertook an analysis of the 5 percent versus 10 percent racial deviation formula.

The Berkeley Students

There's no white flight, academic achievement is still high and the schools are desegregated! So what? How are the kids getting along? Berkeley students accept themselves and each other pretty well. There is no racial unrest in the secondary schools. Berkeley students just do not participate in any substantial disruptive, racial, or gang activities.

BUSD students of all ethnic groups do, however, know how to "make demands on the system." Significant social or local issues will periodically stimulate our secondary students to march in unison down the streets of Berkeley, to speak fervently before the board or the city council, and to petition local site administrators. A student march to the superintendent's office is not ethnically identifiable. Two years ago when over 100 students and adult supporters took over the superintendent's office and slept there for one evening, all ethnic groups were well represented.

BHS is an open campus which allows students to go and come if they have free periods. Designated sections of the campus are available for smoking, and lunch can be eaten on the grounds.

Student interpersonal relations are usually positive. Although a large number of the secondary students have gone through the desegregated system together, distinct ethnic groupings are observable on the various campuses. Some students tend to spend more than their free campus time with classmates of their ethnic group. Others spend much more time in integrated activities.

The truth is that the students have learned to accommodate to each other's needs. Specific students at times will want to mix and at other times they would rather not. That is an individual choice in which the staff does not interfere.

Berkeley students have their share of normal student fights, drug users, and thefts. During any given month, students do "get into it." The ethnicity of student disruptors, however, will vary. The reality of our milieu is that individual students are involved in such incidents, not students of a particular group.

Berkeley students have indeed learned some very important lessons of life. They accept each other most of the time. They live together in relative harmony. What else can you really ask of a student body?

Conculsion

Because the Berkeley model has successfully withstood the test of time, it must be considered a viable program. This community voluntarily desegregated its schools. The citizenry, board, staff, and students wanted desegregation and integration to work and it has.

The mean reading test scores of Asian, black, Chicano, and white students have all increased during the 11 years the program has been in operation. Although black students have made important gains in reading, there is still a gap between their levels of achievement and whites'. Admittedly, we have not solved this problem, but we have made progress.

White parents in Berkeley cannot use "a reduction of standards or quality" as an excuse for removing their youngsters from the public schools. The BUSD SAT scores keep on rising and the admittance rate of Berkeley graduates into prestigious colleges and universities is high.

White flight has not occurred in this Bay Area district. The districtwide student racial percentages have remained fairly constant across the various ethnic groups since the initial year of desegregation. The skewing of racial percentages at several of our schools has caused some site imbalances. After 11 years, attendance boundary adjustments were made prior to the start of the 1980-81 year to correct this problem.

In reality, it is just not possible to desegregate some districts and keep the schools racially balanced. The skewing of the population towards a preponderance of one ethnic group, usually minority, is a common experience observable in a number of communities which have opted to desegregate. This has generally caused white flight.

Berkeley is indeed different and unique. To date, the districtwide ethnic percentages remain stable, support for busing continues to be high, and academic progress is positive for all students. From my perspective, Berkeley is still the capital of school desegregation.

Notes

[1] A Staff Report of the United States Commission on Civil Rights. *School Desegregation in Berkeley, California* (Washington: Government Printing Office, August 1977).

[2] *The New York Times*, December 2, 1979, p. 1.

[3] Georgia Williams (comp.) *School Resegregation: Residential and School Process Study* (Office of Project Planning, Development/Research and Evaluation, Berkeley Unified School District, 1979), p. 2.

[4] A Report of the Housing Committee of the Planning Commission *The People of Berkeley — A Policy*. (Berkeley: The City Planning Commission, August 1974), p. 8.

[5] *Desegregation of the Berkeley Public Schools, Its Feasibility and Implementation* (Berkeley Unified School District: May 1964), p. 1.

[6] Robert Frelow, "Issues and Answers: The Community Dialogue," *The Berkeley Plan for Desegregation* (Berkeley Unified School District, May 1969), pp. 22-43.

[7] "SAT and Math Scores Drop: Back-to-Basics Gets some Blame," *Education USA*, XXII (September 1979), p. 17.

TABLE I

Comparison of Mean Grade Equivalent
BUSD Reading Test Scores of White and Black Students

Grades 1-6

	White				Black		
Grade Levels	1967*	1979**	Gain in G.E.	Mean G.E. National Norm	1967*	1979**	Gain in G.E.
1	1.9	1.9	0.0	1.8	1.6	1.8	.2
2	3.2	3.5	.3	2.8	2.2	2.4	.2
3	4.2	5.7	1.5	3.8	2.8	3.9	1.0
4	5.5	7.0	1.5	4.8	3.6	4.3	.7
5	6.9	8.3	1.4	5.8	4.4	5.4	1.0
6	7.7	9.7	2.0	6.8	5.1	5.9	.8

Grades 7-11

	White				Black		
Grade Levels	1973**	1979**	Gain in G.E.	Mean G.E. National Norm	1973**	1979**	Gain in G.E.
7	9.5	10.5	1.0	7.8	5.7	6.6	.9
8	10.5	11.2	.7	8.8	6.1	7.5	1.4
9	12.2	13.6	1.4	9.8	7.5	8.9	1.4
10	13.6	13.6	.0	10.8	7.7	10.2	2.5
11	13.6	13.6	.0	11.8	8.4	11.0	2.6

*1967 — Stanford Achievement Test
**1973-79 — Comprehensive Tests of Basic Skills

Data for these Tables was compiled by Ramona Maples of the Berkeley Unified School District Office of Research and Evaluation

TABLE II

Comparison of
Scholastic Aptitude Test Scores of High School Seniors

	1967-68 Mean Scores		1978-79 Mean Scores	
	Verbal	Math	Verbal	Math
Berkeley High	524	542	484	519
National	466	492	427	467
Difference	58	50	57	52

TABLE III

A Summary of the K-12 Student Population Attending the Berkeley Schools From 1963-1979 by Ethnicity

	White		Black		Asian		Chicano		Amer. Ind.		All Others		Total
Year	N	%	N	%	N	%	N	%	N	%	N	%	N
1963	8479	54.0	5847	37.3	1261	8.0	—	—	—	—	103	.7	15,690
1964*	8154	51.6	6147	39.0	1300	8.2	—	—	—	—	191	1.2	15,790
1965	7740	49.6	6323	40.5	1324	8.5	—	—	—	—	211	1.4	15,598
1966	7872	50.3	6388	40.8	1233	7.9	—	—	—	—	165	1.1	15,658
1967	7896	50.0	6526	41.3	1165	7.4	—	—	—	—	197	1.2	15,784
1968**	7183	46.2	6665	42.8	1167	7.5	527	3.4	—	—	19	.1	15,561
1969	6880	45.0	6660	43.5	1209	7.9	536	3.5	—	—	18	.1	15,303
1970	6549	43.4	6728	44.6	1294	8.6	503	3.3	—	—	18	.1	16,092
1971	6488	43.3	6673	44.5	951	6.3	576	3.8	—	—	293	2.0	14,985
1972	6479	44.6	6426	44.2	917	6.3	431	3.0	19	.1	252	1.7	14,524
1973	6338	44.7	6252	44.1	876	6.2	455	3.2	14	.1	248	1.7	14,183
1974	6198	44.9	6025	43.7	838	6.1	454	3.3	18	.1	264	1.9	13,797
1975	5816	45.1	5470	42.4	850	6.6	406	3.1	16	.1	347	2.7	12,905
1976	5420	44.6	5195	42.8	794	6.5	394	3.2	13	.1	326	2.7	12,142
1977	5189	45.0	4917	42.6	739	6.4	414	3.5	14	.1	258	2.2	11,531
1978	4992	45.8	4752	43.6	642	5.9	413	3.8	18	.2	72	.7	10,889
1979	4785	45.1	4595	43.3	677	6.4	479	4.5	24	.2	51	.5	10,611

*Extrapolated from 1963 and 1965 data. Census by race not taken during 1964.

**First year Chicano population separated from white.

U.S. Senate,
Committee on the Judiciary,
Washington, D.C., October 7, 1981.

Meyer Weinberg,
Director, Horace Mann Bond Center for Equal Education, University of Massachusetts, Amherst, Mass.

Dear Professor Weinberg: I want to thank you for taking the time to testify before the Separation of Powers Subcommittee on September 30.

I note on page 4 of your prepared remarks a statement that "A number of school systems that have gone through a busing program and were then called unitary by a court, have been dismissed from further court supervision."

Although the complete transcript of the hearings is not yet completed, I seem to remember that you supplemented your testimony at this point with a reference to "over 100" such instances. It would be of assistance to us to have a listing of these school districts. May I request that you furnish this to me for inclusion in the record.

Again, thank you for appearing before us.

Sincerely,

John P. East, *Chairman.*

University of Massachusetts,
Amherst, Mass., October 14, 1981.

Senator John P. East,
Chairman, U.S. Senate, Committee on the Judiciary, Washington, D.C.

Dear Senator East: Thank you for your letter of October 7th.

Mr. Alexander Ross of the Civil Rights Division of the U.S. Department of Justice was interviewed by a newspaper in Dallas, about two years ago, as I recall, and stated that over 100 desegregation cases had been closed by federal judges who had declared the original desegregation order fulfilled. In other words, the school districts were no longer segregated but now were unitary. Since Mr. Ross is, according to a recent report, in charge of school litigation for Justice he is in a position to supply the specific school districts to which he referred. I do not have them.

It was a pleasure to testify before your Subcommittee and I hope to find this letter helpful.

Sincerely yours,

Meyer Weinberg, *Director.*

The Population Studies Center,
of the University of Michigan,
Ann Arbor, Mich., December 9, 1981.

James P. McClellan,
Chief Counsel, Senate Judiciary Subcommittee on Separation of Powers, Washington, D.C.

Dear Mr. McClellan: I recently received a letter from Senator Howell Heflin concerning testimony which I offered last September to the Senate Judiciary Subcommittee on Separation of Powers. My own research concerns trends in school enrollment and school segregation. I have not conducted any investigations regarding the achievement test scores of children in different regions of the country.

I presume that you have contacted Professor Willis Hawley who also testified at the hearing last September. He will be able to provide you with a great deal of information about trends in the achievement test scores of students.

Sincerely,

Reynolds Farley,
Professor and Research Scientist.

Senator **Baucus.** Could you very briefly answer the question originally posed?

Mr. **Walberg.** I would say that one thing that has not been tried yet, which is an interesting new idea, aside from simply compelling people to do things, I believe the city of St. Louis has a plan in which if students participate in programs that cause further desegregation of the schools, they are awarded so many tuition credits for their college education.

This is a way of introducing the prices, in a sense, for inducements or incentives. Those students who will contribute to desegregation can participate in the plan and benefit from it by external incentives. Other students who choose not to go would not participate.

It seems to me that this has some elements of voluntary choice and would probably be more attractive than a compulsory plan, or admittedly purely voluntary plans that have not worked very well.

Mr. HAWLEY. The creation of incentives is certainly a good idea. The irony here is that the reason why most school systems have acted voluntarily is because they had Federal and State money to facilitate new desegregation efforts. As we have all agreed, I think voluntary desegregation is a desirable objective.

There are a number of things that if you wanted to go a bit further you could. For example, one of the concerns people have is that their property values will decline.

Statistically speaking, they probably do not. We do not have a lot of information on that. The Federal Government could guarantee property values in effect. There is a paper I could share with you on the range of options we have for dealing with the white flight problem, because that is largely what we are talking about here as the crucial political problem confronting desegregation.

Ultimately, it comes down to creating quality schools in central cities that will attract people, both black and white, to them. Until we do that, and I think we all agree on that, we are not going to deal with flight.

Mr. SCOTT. Senator Baucus, I grew up in Wisconsin. One of the first things I learned from a nearby Indian tribe was that you really have to walk in the moccasins before you know.

I have worked in ghetto schools. All I can say is that there is so much that needs to be done in the processes of learning that I wish we would cease diverting resources into court mandates which have no demonstrable value and get onto the task of providing every child, irrespective of race or social background, the fullest and the greatest opportunity to develop competency. It is competency that will lead to actual integration.

Senator BAUCUS. Thank you all very much. I appreciate your help.

Thank you, Mr. Chairman.

Senator EAST. Thank you, gentlemen. We appreciate your help. I welcome this next panel.

We have Dr. J. Michael Ross who is an associate professor of sociology at Boston University; Dr. Charles T. Clotfelter, director of graduate studies, Institute of Policy Science and Public Affairs from Duke University in Durham, N.C., one of our constituents whom we are delighted to have this morning; Dr. James McPartland, codirector, Center for Social Organization of Schools, Johns Hopkins University in Baltimore, Md.; and Dr. Reynolds Farley, professor of sociology, University of Michigan, Ann Arbor, Mich., and research scientist at the Population Study Center. Each man each in his own way has a distinguished record. We appreciate your coming and being a part of this panel discussion.

Gentlemen, my regrets to you that time keeps slipping away on us. I would like to suggest, due to the severe time constraints under which we work, that your written remarks will be made a part of the record. I would appreciate your summarizing orally and extemporaneously your general feelings on this matter. As I say, we can then look at the full text of your remarks.

If I find that time is drifting on too much, I would like to reserve the right to interrupt and ask you to summarize and conclude as quickly as you can so that no one of you is totally excluded on this. We would also then have a few minutes remaining for questions and answers.

Mr. Ross, if you would please begin.

STATEMENT OF JOHN MICHAEL ROSS, PROFESSOR OF SOCIOLOGY, BOSTON UNIVERSITY, BOSTON, MASS.

Mr. Ross. Thank you, Mr. Chairman. I will try to speak extemporaneously. I am addressing in my testimony the issue of white flight due to legally mandated court orders.

My research findings, which are summarized in my testimony, are based upon systematic surveys of parental reactions to court-ordered desegregation. It also includes systematic analysis of school loss rates within cities and finally some comparative data.

After extensive analysis, my conclusions are quite clear. The evidence on white flight is incontestable. In the first year of court-ordered school desegregation, there is at least a doubling of the white loss and typically three to four times the loss rate that would be expected due to normal demographic factors. This loss continues in subsequent years. No city has experienced a pattern where the losses incurred in the first year are someway compensated by relative gains in subsequent years as some people have argued.

Research shows that most of this loss is due to desegregation—at least two-thirds. It is permanent and not temporary. Unfortunately, it may not be reversible. Over time mandatory programs can only contribute to the creation of a more segregated central city school system, typically surrounded by white suburbs and now with segregated enclaves of white private schools. A fundamental difficulty for any mandatory school assignment policy is the fact that a large proportion of white students assigned to minority schools does not attend those schools.

In my testimony, the data from Boston and Los Angeles are thoroughly documented. The losses run from 50 to 60 percent. There is no way that those schools can be desegregated, using the procedures of mandated school assignents. The most important issue for this committee to consider is alternative remedies.

My conclusions, based upon several years of research, indicate that this Nation's experience with court-ordered school desegregation has demonstrated the limits of governmental power to achieve social change. The complex interrelationship of Government policy and the individual response of parents often has indirect consequences which produce a result opposite from the one intended by the initiators of that policy.

The courts cannot control the actions of individual parents unless they eliminate all choice by prohibiting transfers to private schools or even prohibiting residential relocation outside the school district. If the fundamental issue is parental perception of no longer having a choice in the schools their children attend, the option to select a school, whether the school is public or private, predominantly white or integrated, a nearby neighborhood school or a school with special programs in a different neighborhood, is a choice which most parents have intense feelings about. If parents are denied this choice, then large numbers simply withdraw from public schools and find some other alternative for the education of their children.

Without a certain level of white participation, discussion of the education and psychological benefits of school desegregation simply are irrelevant—both as a legal question and as a sociological question. The resolution of the current dilemma should focus on restoring the element of choice for parents in a manner that preserves the commitment to public education without denying minority parents the choice of a desegregated education.

I will skip to my conclusion now and basically quote from a recent State court decision in Los Angeles. A lot of the information that I have summarized is based upon analysis of white flight but also analysis of mandatory versus voluntary programs. There is evidence that voluntary can produce more desegregation than mandatory in Los Angeles.

Some of you may be familiar with the Los Angeles case in the testimony of Dr. David Armor. They have a new trial judge who had opportunity to review extensive social science evidence and data on enrollment patterns over time. His conclusion was that:

> The time has come for common sense to return to the treatment of desegregation in the public schools. The framework of law is provided by the guidelines given this court in the decisions in this matter rendered by the Supreme Court and the Court of Appeal and each of them.
>
> These decisions place a duty upon the trial court to oversee a process of desegregation planning wherein the Board of Education elected by the people is the primary planner. The law precludes judicial intervention in the planning and/or implementation process even if the court believes that alternative desegregation techniqes may produce more rapid desegregation so long as a plan developed by the elected Board of Education utilizes reasonably feasible steps to produce meaningful desegregation.

I hope that legislative and other judicial decisionmakers will be similarly motivated to act in a comparable fashion in the future.

Thank you.

Senator EAST. Thank you.

[The prepared statement of Professor Ross follows:]

PREPARED STATEMENT OF PROF. JOHN MICHAEL ROSS

Introduction

For the last six years, the "white flight" issue has stimulated rancourous academic disputes and it has played an important role in equally bitter public debates over court-ordered "busing." Often the critical empirical issues in the "white flight" controversy have been obscured by complex methodological arguments and, at times, by highly personal attacks on on the professional competence and personal integrity of certain researchers. If there is a crisis within the academic community on this issue, it reflects fundamental doubts concerning the effectiveness of legally mandated school desegregation policies among many researchers, including those previously committed to active intervention by the courts.

In my statement, I have summarized the relevant research findings from three different sources: systematic surveys of white parents before and after court-ordered school desegregation; school by school differences in white losses within individual districts; and conventional comparison of between-district aggregate losses. The interplay between the three types of data permits one to a) confirm and qualify certain findings with multiple sources, b) to explore the long-term dynamics of white withdrawal from the public school system, and c) to offer plausible and verifiable explanations for the behavior of white parents.

It is my opinion, based upon several years of research, that the evidence on "white flight" is incontestable. There is a large increase, at least twice and typically three to four times, in the expected (i.e. normal demographic) loss of white students when court mandated desegregation occurs. Moreover, higher than normal losses continue in subsequent post-implementation years, contradicting the argument that relative gains in these years cancel out the initial loss. No city has experienced a pattern of lower than normal white losses in post-implementation years that, in some unknown way, compensates for the large loss in the first year of desegregation. No studies have reported students returning to the public schools from private schools in substantial numbers or found any residential migration of white families with school-age children back into central cities where the public schools are desegregated by court order. Most (at least two-thirds), of the "white flight" is due to desegregation, not other factors; it is permanent, not temporary; and, unfortunately, it may not be reversable.

From a policy perspective, there appears to be no alternative but to reconsider the effectiveness of extensive mandatory school desegregation policies. Although mandatory programs may appear to be more effective than voluntary programs in accomplishing more desegregation in the short-run, over time they only contribute to the creation of a more segregated central city school system surrounded by all white suburbs with scattered segregated enclaves of white private schools. The fundamental difficulty for any mandatory school assignment policy is the fact that a large proportion of white students assigned to predominantly minority schools do not attend these schools. When minority students are transferred to schools in white neighborhoods, the white loss rate at these schools is considerably lower. In other words, parental opposition to desegregation per se is not the critical factor. Rather, opposition to mandatory reassignment to a school other than the resident school is the primary motivating force behind white withdrawals. Thus, mandatory policies fail to desegregate racially isolated minority schools as intended and most of the desegregation associated with these programs in these cities is produced by one-way mandatory assignment of black students to white schools. Voluntary programs typically can accomplish this objective more effectively and without an excessive loss of white students.

The nation's experience with court-ordered school desegregation has demonstrated the limits of governmental power to achieve social change. The public pressure for legislaative releif from "forced busing" is another symptom of widespread opposition to busing. The complex interrelationship between government policy and the individual response of parents often has indirect consequences which produce a result opposite from the one intended by the initiators of that policy. The courts cannot control the actions of individual parents unless they eliminate all choice by prohibiting transfer to private schools or residential relocation outside the school distrct. Yet, the fundamental issue is the parental perception that they no longer have a choice in the schools their children attend. The option to select a school, whether the school is public or private, predominantly white or integrated, a nearby neighborhood school or a school with special programs in a different neighborhood is a choice which most parents have intense feelings about. When parents are denied this choice, then large numbers simply withdraw from the public schools and find an alternative for their children. Without a certain level of white participation, discussion of the educational and psychological benefits of school desegregation is simply irrelevant, both as a legal question and as a sociological question. The resolution of the current dilemmma should focus on the restoring the element of choice to parents in a manner that preserves the commitment to public education without denying minority parents the choice of a desegregated education.

1. The Individual Response of White Parents to Court-Ordered School Desegregation

Boston: I shall begin with a brief summary of some research based upon a pre-court order and post-implementation study of white families in Boston. The design of this study, a quasi-experimental multi-wave panel study, is important for two reasons:

1) It contains a measure of school desegregation attitudes and relocation intentions before the the desegregation court order and a measure of behavioral outcomes after the Garrity decision

and after the implementation of the school desegregation plan in Boston.

2) The study included families with school-age children from six middle-class neighborhoods in Boston and three control (comparison) groups that were similar in terms of residential and socio-economic characteristics but which were not impacted by court-ordered desegregation.

The results from this research are dramatic in terms of documenting the magnitude of flight from the Boston public schools over a five-year period. The findings are critical because most, if not all, alternative explanations for this exodus can be eliminated as not plausible.

Table 1
White Loss in Boston

	Impacted Families Boston			Non-Impacted Families Boston		Dedham
	All Public	Mixed Public/ Paroch	Pre-Public	Paroch Only	No Kids	
No Action	39.1%	51.3%	0.0%	86.8%	84.8%	82.7%
Transfers Phase I-IIb	30.8	28.9	50.0	—.—	—.—	2.7
Relocation Phase I-IIb	19.9	13.2	40.0	7.9	15.2	6.7
Transfers Phase III-IIIb	3.5	3.9	5.0	—.—	—.—	—.—
Relocation Phase III-IIIb	6.6	2.6	5.0	5.3	—.—	8.0
(N)	(376)	(76)	(20)	(38)	(46)	(75)

As shown in Table 1, we found only 39.1 percent of the Boston public school families (with all of their children enrolled in public school prior to the court order) did not avoid court-ordered school desegregation by either transferring at least one child to a parochial (private) school or by relocating their families outside of Boston. Most of this withdrawal (50.7 percent) occurred within the first two years of implementation. The transfer of children to parochial (private) school was the most frequent mechanism for escapee (30.8 percent) chosen by parents but 19.9 percent still relocated outside the city. In sharp contrast, few comparable families in Dedham, a suburb adjacent to Boston and not affected by the court order, transferred to parochial (private) school (2.7 percent) or moved (6.7 percent) during the same period. If there had been a large-scale residential relocation of families with school-age children within these impacted neighborhoods (for some reason other than desegregation), we would not expect to find such a low rate of relocation among parochial-school-only parents in Boston. Similarly, a small group of parents in this sample had pre-school age children only prior to the court order. By the time the children reached first grade, not one family had their children enrolled in the Boston public schools. The composition of the families who replaced those who left the city showed that the large majority (83 percent) did not have children enrolled in the public schools. Only ten percent of the relocation losses of public school students were compensated for by new students.

This survey data on the behavioral decisions of individual parents allows one to examinine the reasons for the decision to withdraw from the public schools based upon pre-court order attitudes and demographic factors. The major factor separating families who did not withdraw their children from those who did withdraw was whether or not their neighborhood was impacted by court-ordered desegregation. Within these neighborhoods, the amount of change in racial contact was equally important. Most families who kept their children in the public schools had only a small increase in the percentage black at the schools attended by their children. This is often facilitated by a move within Boston or enrollment in an exam school. Pre-court order intentions to move and dissatisfaction with the neighborhood (as well as dissatisfaction with the public schools) had no effect on the decision to withdraw. In other words, there is no empirical foundation for the speculation that these families would have left the public school system without the occurrance of desegregation. Similarly, opposition to integration and even attitudes toward the busing of both races made no difference in the decisions of parents. Thus, the actual involvement in manadatory reassignment policies was a sufficient motivating factor for withdrawal. There was a tendency for higher income, younger and better-educated parents to withdraw. Where attitudes and background characeteristics did make a difference was in the choice between transferring or moving once the decision not to comply was made. Single parents, renters and younger families were, as expected, more likely to move although this group was actually more favorable to busing than parents who transferred their children to parochial/private schools.

This research also included an analysis of the actual schools attended by the children in each family (Table 2) in the study. The findings are generally consistent with aggregate estimates of "white flight" in Boston but, in this case, these figures represent real losses and we know which students went to parochial (private) schools rather than to suburban public schools. The first year of desegregation shows a loss of, at least, 9.0 percent and the second year shows a further decline of 19.4 percent (both estimates are conservative since a small fraction of the students could not be traced). Moreover, withdrawals continue throughout the post-implementation period (-8.4,-9.1,-8.3), establishing the validity of the long-term effect for pupils enrolled in Boston's desegregated district public schools. There is, for all practical purposes, no reverse transfer in any year from parochial to public schools, including magnet schools, to compensate for these losses. In addition, the rate of parochial school enrollment (35.5 percent) for the younger pre-kindergarten students is twice as high as the enrollment in the regular district schools (17.5 percent) in the post-implementation period.

Table 2
Boston: Year by Year Losses From Public Schools (District)

	Implementation		Post-Implementation		
	1974	1975	1976	1977	1978
District (public)	75.2%	57.1%	74.1%	75.1%	68.0%
Magnet/Exam (public)	3.2	16.6	9.0	12.3	12.3
Transfer (to parochial)	12.8	9.5	6.2	5.1	4.9
Relocation (outside of Boston)	6.2	8.9	2.2	4.0	3.4
Status Unknown	2.5	7.3	6.9	3.6	11.3
	(678)	(548)	(321)	(253)	(203)
Graduated	2.3	6.6	5.3	5.2	8.1

All the evidence points in the same direction: substantial white withdrawal in the post-implementation year; transfers to parochial schools and residential out-migration; new kindergarten students now enrolled in parochial rather than public schools; no returns back to the public schools; and, of course, no new families with school age children entering the system.

The only potential source of stability is the city-wide magnet and exam schools. The small flow from parochial to public schools consists primarily of transfers to the elite exam schools which are still predominantly white. Most Boston parents are now adept at selecting a "desirable" mix of regular district schools (typically the school near their residence), magnet or exam schools, and parochial schools in a manner than maximizes the element of choice in the selection of the "best" school for their children. However, the collective product of these individual actions has not produced a pattern of enrollment conducive to stable desegregation in Boston.

Los Angeles: The situation in Los Angeles was conducive to another study of parental responses to court-ordered school desegregation. This research, in fact, was presented to Judge Egly by the Los Angeles Unified School District as part of the proceedings for proposed modifications to his 1978 plan. Once again, a random sample of white parents could be divided into an experimental and "control" group: one set of families whose schools were paired with a minority school into a cluster (PCM) for the purposes of desegregation, and the other group remained at their resident schools (CIS), which had between 20-30 percent minority populations and were considered "naturally" desegregated.

Table 3
White Loss in Los Angeles 1978-1979

	Attend PCM	Magnet	Other LAUSD Public	Unidentified LAUSD Public	Private	Outside LAUSD	(N)
PCM	45.0%	4.2%	8.3%	6.7%	16.7%	19.2%	120
CIS	74.4	1.8	2.4	7.1	1.2	13.1	168

In the affected grades (3-7), only 45.0 percent of the student attended a school in the cluster as compared to 74.4 percent of the students in schools not involved in the mandatory part of the plan. Even without a well-established parochial/private school system like Boston's, 16.7 percent of the students were found in private schools one year after the plan was initiated contrasted with only 1.2 percent from the schools exempt from busing. Likewise, the incidence of residential migration was higher (19.2 percent) for families affected by the plan than for families not affected (13.1) by it. The largest difference, however, was observed in the younger cohort (K-2) of students who would start to participate in the plan in a couple of years. A sizeable number (14.8 percent) were either enrolled in private schools or attending schools outside of Los Angles (20.4 percent). Thus parents, in anticipation of mandatory reassignments, were making sure there were available seats in a private school when they would need them or getting out while they could. In this research, the replacement families were again identified to see if they had children participating in the desegregation program. Approximately one-third of the new residents had children, but only one child from the twenty-six replacement families was enrolled at a school where students were mandatorily transferred between schools, but seven children were attending private schools.

Despite the contrast in the social and political climates of the two cities, white parents in Los Angeles did not act much differently from their Boston counterparts. Given the limited duration of mandatory reassignments (three to six years), Los Angeles parents were able to find alternatives to mandatory desegregation despite limited private school capacities and restricted housing opportunities. To look at the behavior of these parents as simple "flight" is deceptive. Many complex rearrangements were made by families in order to avoid participation for as many years as possible. There were options and choices that could not be controlled by the court.

2. Between-School Differences and the Process of White Withdrawal

The magnitude of "white flight" observed in Boston and Los Angeles may, in itself, be surprising to some social scientists. However, it is also important to understand the interrelationship between initial reassignment of white and minority students to non-neighborhood schools, high non-attendance at certain schools, additional reassignments, further losses, and higher minority percentages at all schools. The existence of a long-term effect of mandatory school desegregation on white enrollment is still being questioned by some school desegregation researchers and, for this reason, it is important to show why subsequent loss-term losses are an inherent feature in mandatory most desegregation programs.

Systematic analysis of individual school loss rates (based upon their projected and actual enrollments) in Boston and Los Angeles, as well as Seattle, shows large differences in non-attendance ("no-show") rates between schools. These differences are related to the individual racial composition of the school prior to the court order and the number of new students reassigned into the particular school each year.

Table 4
Estimated Implementation and Post-Implementation Loss Rates

	"Normal" Loss No Desegregation	Additional Post-Imp Reassign for Prior White Loss	No Additional Post-Imp Reassign
Former Black School: White Students Reassigned-In			
Imp Year	-.135	-.389	
T+1	-.096	-.340	-.176
T+2	-.089	-.278	-.203
T+3	-.087	-.213	-.099
T+4	-.080	-.161	-.047
Former White School: Black Students Reassigned-In			
Imp Year	+.017	-.094	
T+1	+.003	-.087	-.092
T+2	+.045	-.076	-.075
T+3	+.028	+.011	-.055
T+4	+.005	+.069	-.067

If one looks at two typical schools in Boston, one predominantly black and the other predominantly white prior to the court order, estimates for different conditions can derived for an averaage loss rate from a multiple regression analysis of observed between-school variation (see Table 4). The expected loss rate for the black school, when white students are reassigned, is -38.9 percent in the first year of desegregation. The white school, also with a projected racial composition of fifty percent black due to the reassignment of black students, has a much lower (-9.4 percent) expected loss rate than the formerly black school. However, there is still a decline compared to the "normal" (no desegregation) estimate. In subsequent post-implementation years, additional reassignments of white students at the formerly black school necessary to replace white withdrawals in prior years leads to moderate losses in the projected white enrollment through, at least, the third year of desegregation. If there are no new reassignments of white students, the loss rate is slightly lower. Without any replacements, however, the percentage black increases by, at least, twenty percent and the school is likely to again become predominantly black. At the formerly white school, the decline does not appear to be large, but there is still a small effect for the initial assignment of black students in the implementation year. At some point in the future, equalibrium might be reached where the history of past assignments and the current racial composition of schools is not important in the capability of each school to retain most of its white student population.

Similar patterns of white non-attendance at minority receiver schools are also found in Los Angeles. In 1978, the first year of mandatory reassignment, the loss rate was -57.2 percent at minority receiver schools in contrast to a decline of only -20.7 percent at white resident schools within the clusters. In the second year, a large percentage (-50.5) of the entering cohort of fourth grade white students likewise did not attend their assigned minority school and smaller losses were recorded at the resident school. Even among prior participants in the plan (fifth and sixth graders), the decline was substantial (-37.8 percent) at minority receiver schools. When the sequence of grade assignments specified a return to the resident school, we find a net increase in the number of students relative to the prior year.

Table 5
Los Angeles
White Loss Rates at Minority and White Receiver Schools
by Participation Status

	Minority Receiver			White Receiver		
	1978	1979	1980	1978	1979	1980
New Participants	-57.2 (2790)	-50.5 (1167)	-48.1 (7494)	-20.7 (4512)	-19.9 (952)	-19.8 (7561)
Prior Participants		-37.8 (823)	-24.9 (1841)		+5.0 (2861)	+7.5 (2186)

In 1980 the Los Angeles plan was modified (less travel time between schools with an expanded grade participation). The results, however, replicated the previous experience with mandatory transfer policies. First-time participants failed to "show-up" at the same high rate (-48.1 percent) as in previous years, and prior participants had a non-attendance loss rate of -24.9 percent at the minority receiver schools. The reentry at white resident schools continued and, in some clusters, exceeded fifty percent.

The 1980 program should have produced a significant increase in interracial contact at the elementary level given the expansion of participating grades from fourth through sixth grade to first through sixth grade. However, the percentage white for the average black student in these clusters was 31.6 percent in 1980, a net increase of only 3.8 percent over 1979. After three years of mandatory transfers of white students to minority schools, the percent white had risen to 32 percent. In the meantime, the percent white in the white schools had fallen to 39 percent.

3. Long-Term Losses and Changes in Interracial Contact

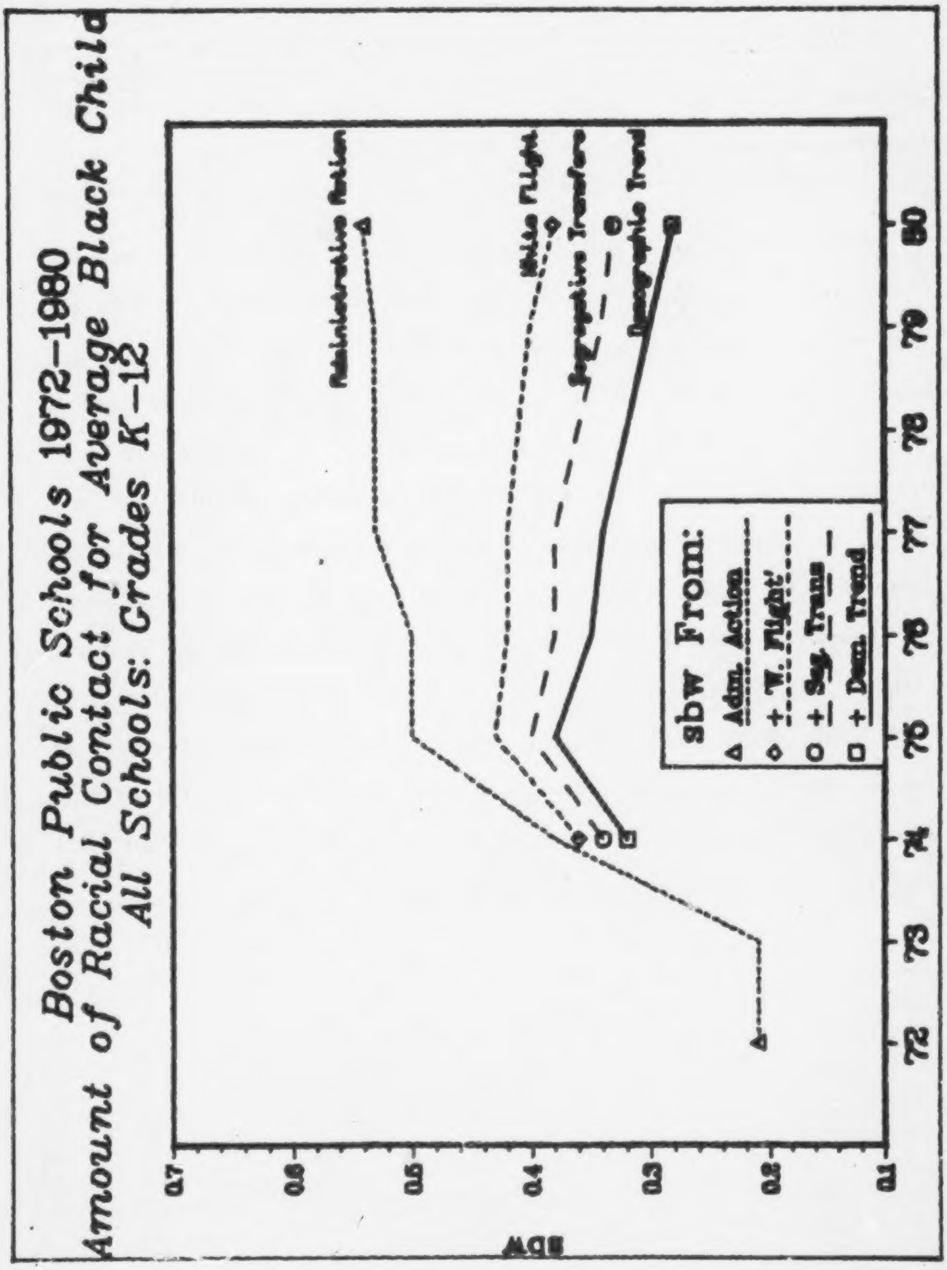
A final note on the long-term effect of court-ordered school desegregation on white enrollment should be included in this presentation since this phenomenon has eluded most researchers using comparative aggregate data. Most comparative analysis of between-city losses cannot distinguish between the type of mandatory desegregation plan (e.g. court-ordered or school board initiated) or break down the amount of desegregation achieved into mandatory versus voluntary components. A reanalysis of the central city school district used by Farley and the change in the Dissimilarity Index, as a measure of desegregation, shows a diffferent long-term trend when all relevant factors are statistically controlled. The implementation year effect, a change of at least eight points, indicates a loss twice that of districts that did not desegregated. In contrast to Farley's findings, the desegregated districts continue to have higher loss rates until the fourth post-implementation year.

Table 6
Interrupted Times Series
Ninety-One Central Cities

	t-1	t+0	t+1	t+2	t+3	t+4
No Deseg	-5.088	-6.054	-7.056	-6.559	-6.106	-6.526
Desegregated	-4.271	-12.947	-8.951	-8.238	-6.861	-6.599

Has court-ordered school desegregation been successful? Some may equivocate, conceding that it has not been as successful as expected, that "white flight" can be a problem in the short-run, and still argue that, perhaps in the long-run, the policy will be demonstrated as effective. Once again, the data on Boston is informative when systematic quantitative measures are used to measure effectiveness and change in interracial contact. As graphically summarized in Figure 1, administrative action by the courts was responsible for a large increase in interracial exposure for the average black child, but the abstract plan and its complex assignment policies are not the ultimate reality. Both "white flight" and transfers between schools consistently reduced the amount of desegregation each year such that the court-ordered plan only achieved two-thirds of its objectives. Moreover, most of this change in black-white contact is concentrated in the magnet schools.

Figure 1


Boston Public Schools 1972–1980
Amount of Racial Contact for Average Black Child
All Schools: Grades K–12
sbw
0.7
0.6
0.5
0.4
0.3
0.2
0.1
72
73
74
75
76
77
78
79
80
Administrative Action
White Flight
Segregative Transfers
Demographic Trend
sbw From:
△ Adm. Action
◇ + W. Flight
○ + Seg. Trans
□ + Dem. Trend

Conclusion: Social Science Evidence on Trial

In the above presentation, I have attempted to present consise summaries of critical research studies on "white flight." It is somewhat ironic that the aggregate data in the Farley study was basically the same information used by James Coleman in his controversial "white flight" study six years ago. While it may be true that "not one white parent was asked by Coleman if his or her child was removed from the public schools because of school desegregation," individual data (or, at least, school level data) has consistently confirmed the "white flight" thesis. If anything, the effect of school desegregation on white withdrawal from the public schools is larger and its duration more long-term than Coleman realized. There should be no question that this phenomenon exists and is not the fabrication of ingenious statistical manipulations.

In addition to the numbers, we have learned that "white flight" is a complex response to externally imposed constraints on the selection of schools by parents. However, as we have observed, these constraints cannot deter the adaptive capability of parents to find other alternatives to the limited choice of schools presented by judicial authorities. The question to be posed is whether school desegregation policies can take advantage of this creative problem-solving behavior to maximize parental choice and thereby minimize flight and, at the same time, create more opportunities for stable desegregation.

Voluntary school desegregation strategies have been dismissed as "ineffective" by most social scientists rather than being carefully studied. In the present context, alternatives to mandatory policies should be the key research agenda for school desegregation researchers.

Any objective observer of the Los Angeles situation should understand Judge Lopez's plea for common sense and hope that legislative and other judicial decision-makers will be similarly motivated to act in a comparable fashion in the future.

The time has come for common sense to return to the treatment of desegregation in the public schools. The framework of law is provided by the guidelines given this court in the decisions in this matter rendered by the Supreme Court and the Court of Appeal and each of them.

These decisions place a duty upon the trial court to oversee a process of desegregation planning wherein the Board of Education elected by the people is the primary planner. The law precludes judicial intervention in the planning and/or implementation process 'even if [the Court] believes that alternative desegregation techniques may produce more rapid desegregation' (Crawford I at p. 306), so long as a plan developed by the elected Board of Education utilizes reasonably feasible steps to produce 'meaningful progress . . . .' [Crawford v LAUSD]

Senator East. Dr. Clotfelter?

STATEMENT OF CHARLES T. CLOTFELTER, ASSOCIATE PROFESSOR OF PUBLIC POLICY STUDIES AND ECONOMICS, DUKE UNIVERSITY, DURHAM, N.C.

Mr. Clotfelter. Thank you, Senator.

I have three points to make. No. 1, desegregation has caused some degree of white flight in many cases, although desegregation is only one of many causes of white losses from school systems. No. 2, despite this there is greater contact between the races in schools today than existed before desegregation of the 1960's and 1970's. No. 3, it is necessary to evaluate the benefits as well as the costs of school desegregation in a complete assessment of the policy. Let me elaborate very briefly.

No. 1, white flight: My reading of the social science evidence suggests that in many situations desegregation policies have led more whites to leave desegregated districts than would have occurred otherwise. This has been called "white flight." The effect appears to be the strongest in the large urban districts with some minimum presence of minority students and in nonmetropolitan systems with high proportions of minority students. Moreover, the effect appears to be stronger for higher income whites where class differences between blacks and whites are geater and where desegregation is carried out in city school systems separately from predominantly white suburban systems.

At the same time, there are other factors responsible for white losses from school systems, especially city school systems: Demographic changes that have led to a marked decrease in the number of white schoolchildren, decentralization of jobs, public policies that have led to suburbanization, rising incomes, as well as housing discrimination.

School desegregation represents only one cause of white enrollment losses. Despite these tendencies toward resegregation, however, there is by and large greater racial contact between the races in schools today than existed before the desegregation initiatives of the 1960's and 1970's.

Although evidence on this is still mixed and we are waiting for the 1980 census, a recent report showed that over the period 1968 to 1976 the percentage of minority students in essentially all minority schools decreased from 53 to 17 percent over the whole country. This decrease was greatest in the region where busing was used most extensively—the South—where the percentage fell from 75 to 12 percent. In six Northern States where few ambitious plans have been undertaken, the percentage fell only from 36 to 31 percent.

Some resegregation has certainly occurred, particularly where suburban alternatives exist, but it does not appear to have offset the basic effect that desegregation has of increasing racial contact. To examine this question more closely, I looked at three metropolitan areas where desegregation has occurred: Charlotte and Raleigh, N.C., and Atlanta, Ga.

Schools in Charlotte and Raleigh are covered by countywide plans, while Atlanta has had some desegregation in the city and is often pointed to as an extreme example of counterproductive white flight. For Atlanta, I looked at three systems together. The question is: Has the resegregation that has occurred as a result of desegregation had the effect of resegregating the schools themselves by decreasing contact between blacks and whites? The answer for these cities is no. When you look at the number of students in isolated situations—that is, in schools 90 to 100 percent their own race—this measure falls in each of those cities, even Atlanta, where white flight did occur to some extent. The point is that there is more contact today between blacks and whites than there was at the beginning of desegregation.

Finally, on the point of costs and benefits of desegregation: In order to make a full assessment of present desegregation remedies, it is necessary to consider fully the benefits as well as the costs of school desegregation. Gains such as Jim McPartland will describe from increased accessibility to job markets and increased achievement need to be considered. They are very hard questions to decide. I do not pretend to know how to measure and evaluate them. That is a question for public policy.

In conclusion, S. 1647 makes four basic assertions about assignment and transportation of students on the basis of race. The first two are essentially legal questions—that it is unconstitutional and that it fails to account for racial imbalance to other factors, and I have no special expertise to speak to those questions. The third is that assignment and transportation of students by race leads to greater separation of the races. As far as schools go, as I have stated, I do not believe there is strong evidence for this assertion.

The fourth assertion is that the cost of assignment by race exceeds the benefits. There are real costs and real benefits from desegregation. Their identification and evaluation are complicated and terribly important.

Given the available information, it is not obvious we would come out on that question. It is a question that certainly deserves serious and further consideration.

Thank you.

Senator EAST. Thank you.

[The prepared statement of Professor Clotfelter follows:]

PREPARED STATEMENT OF PROF. CHARLES T. CLOTFELTER

Mr. Chairman: As I understand the purpose of this panel and these hearings, my task is to discuss "social dislocations" and "white flight" associated with school desegregation. Since these issues comprise only part of the broader evaluation of desegregation policies, I will begin by explaining how I believe the panel's particular topic relates to these broader considerations. Then I will turn to a description of recent enrollment trends and a summary of the research on how these trends have been influenced by school desegregation.

"Social Dislocations" and the Evaluation of Desegregation Policy

The "social dislocations" associated with school desegregation presumably include such things as the effect of desegregation plans on attendance patterns and neighborhood schools, on the transportation modes and length of trips made by school children, on local private school enrollment, and on the residential location decisions by families. These effects comprise some of the most important costs of school desegregation. But focusing exclusively on these costs--without examining the benefits of desegregation--would be one-sided at best, and possibly irrelevant.

To elaborate, it is useful to distinguish two general approaches to the evaluation of school desegregation as an instrument of social policy. First, it may be that school desegregation, including certain forms of school busing, is mandated either by absolute constitutional or moral principles. If so, a discussion of the costs of desegregation is simply irrelevant because no costs could overcome such an absolute imperative. An alternative approach to the evaluation of desegregation would hold that a particular desegregation policy ought to be pursued if the benefits to society outweigh the policy's social costs. That there are social costs to certain forms of school desegregation is evident in opinion polls and public statements opposed to school busing. According to this second approach to evaluating out existing policy, the costs underlying this opposition ought to be considered in a full assessment of desegregation policy. These costs include "social dislocation" and "white flight." It goes without saying, however, that these costs are not the whole story. Gains from desegregation--in achievement, race relations, residential integration, and improved job opportunities--must also be considered. If this second approach is adopted--which I take to be the position of many in Congress--it is up to Congress to weigh the benefits and costs of various desegregation approaches. This is an awesome task, for it demands that the gains to some be weighed against the losses incurred by others. Social scientists can suggest the nature of the costs and benefits of policy, but they have no special insight regarding the difficult task of evaluating social worth. Given this proviso, I turn to the consideration of one set of effects of desegregation: the effect on residential and private enrollment decisions of whites.

"White Flight" and the Context of Suburbanization

"White flight" is the popular term describing declines in white enrollment from public schools undergoing desegregation. The term may be somewhat misleading, however, since school populations are typically subject to turnover during any period, and most observed declines in white enrollment appear to result as much from a decline in the influx of new whites as from the "flight" of current students. One unavoidable observation is that the proportion of white students in central city school systems as a whole has been declining since World War II. This has been the result of two trends in metropolitan areas: the increasing suburbanization of jobs and residences and the growing concentration of minorities in central cities. These two trends are related because whites have been overrepresented in the movement to the suburbs. From 1950 to 1979, suburbanization reduced the proportion of whites living in central cities from 55.0 to 36.4 percent of the total metropolitan area white population. In contrast, the proportion of metropolitan blacks living in central cities--approximately three-fourths--remained almost constant. This difference in the net rates of suburban movement, which also reflects significant black migration into central cities over part of the period, has resulted in an increase in the concentration of blacks and other minorities in central cities. The percentage of blacks among central city residents nearly doubled between 1950 and 1979, increasing from 12.3 to 23.3 percent in all metropolitan areas.[1] In the largest cities minority concentration is even more pronounced, and this concentration naturally affects the racial makeup of the public schools in these cities.

There are three basic causes of the parallel trends of suburbanization and racial separation in metropolitan areas. First, "natural" forces such as new land-intensive production techniques, improved truck and automobile transportation, advances in communications and remote data processing, and rising family incomes make suburban locations for firms and homes both more feasible and more desirable. When examined in conjunction with other trends and statistics, the increased attractiveness of the suburbs has had a distinct effect upon metropolitan racial patterns. Because whites have had higher incomes, they have demanded more new suburban housing than have blacks. At the same time the migration of blacks from the South in the 1960s increased the proportion of nonwhites in large Northern central cities. Finally, recent demographic changes have resulted in a steady increase in the proportion of blacks among all elementary and secondary students.

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[1] U.S. Bureau of the Census, Statistical Abstract of the United States: 1980 (Washington, 1980), p. 18.
For a more complete discussion of this and other issues raised here, see Charles T. Clotfelter, "The Implications of 'Resegregation' for Judicially Imposed School Segregation Remedies," Vanderbilt Law Review 31 (May 1978), 829-854, from which some of the following material is taken.

Second, major federal policies, particularly those explicitly aimed at stimulating home ownership, have contributed to decentralization and, indirectly, to racial separation. Income tax deductions for mortgage interest and property taxes, as well as a variety of policies aimed at depressing mortgage interest rates, have stimulated the demand for new homes. Most new homes, in turn, have been built in suburbs. Federal policies also have lowered the cost of commuting from suburban communities to central business districts.

Forces of technology, demography, competitive markets, and public policy therefore are largely responsible for the suburban movement in metropolitan areas and for the tendency of many new suburban residents to have above-average incomes. The generally higher incomes of whites, however, alone do not explain why whites have represented so large a portion of this "flight to the suburbs." A third group of factors must be examined in order to explain the white suburban predominance. Such public policies as FHA practices favoring low density dwellings and avoiding racially mixed neighborhoods in making loans, as well as local large-lot zoning restrictions, have fostered both economic and racial residential segregation. More directly, outright discrimination by loan institutions, real estate brokers, and homeowners strengthens segregated patterns. Local enforcement of racially and nonracially restrictive convenants into the 1940s perpetuated this discrimination. In addition, local governmental practices such as segregation of public housing, limitation of road access between white and black neighborhoods, and segregation of public schools have had a pervasive, though uncertain, effect on residential racial patterns.

The Effect of Desegregation on "White Flight"

Among the possible explanations for the movement of whites out of central cities, one that has special relevance to these hearings is the notion that the process of desegregation itself has caused whites to leave central cities.

Such "white flight" from desegregation may be manifested by enrollment in private schools, actual residential moves to other school attendance areas within a district, or moves to nearby school districts. The determination of the effect of desegregation upon white enrollment losses involves three principal empirical tasks: the measurement of the progress of desegregation, the measurement of white enrollment losses and the determination of the correlation between the desegregation and white enrollment variables when other important variables are statistically controlled for or otherwise held constant. Some other variables that might affect white enrollment losses include demographic trends, incomes of blacks and whites, housing prices, fiscal variables, and trends in employment location. A number of empirical studies by social scientists in recent years have analyzed this problem. While the studies are not unanimous in their conclusions, most support the notion that school desegregation has a significant effect on white losses from desegregating districts. Perhaps the best known study in this group, conducted by James Coleman and two co-authors,[2] analyzes enrollment data from sixty-seven districts from 1968 to 1973 and concludes that desegregation significantly aggravates white enrollment losses from central city districts. Furthermore, the effect is strongest in the largest school districts. After several subsequent studies and reanalyses, these findings have been upheld in large part. For example, Reynolds Farley and others used an expanded set of data for urban school systems and concluded that desegregation has a significant one-year effect on white losses. Over a period of years, however, they found less difference between systems undergoing desegregation and those not.[3]

Taken together, the most pervasive finding of the empirical studies on this subject is that white losses tend to accelerate from districts in which desegregation plans attempt to increase the proportion of blacks in the average white student's school. This effect, however, is by no means uniform over all districts. The effect appears to be strongest in the largest urban districts (over 80,000 in enrollment) and in rural districts with high proportions of blacks. The responsiveness of whites to desegregation also appears to be nonlinear; that is, beyond a certain threshold of racial composition, whites become increasingly sensitive to desegregation. For example, in large urban districts in which whites attended schools that were on the average over six percent black, white

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2. James S. Coleman, Sara D. Kelley, and John A. Moore, "Trends in School Segregation, 1968-1973," Urban Institute Paper 722-03-01, August 1975.

3. Reynolds Farley, Toni Richards, and Clarence Wurdock, "School Desegregation and White Flight: An Investigation of Competing Models and their Discrepant Findings," Sociology of Education 53 (July 1980), 123-130.

enrollment decreased about one percent for every one percent increase in this white exposure rate. In districts with white exposure rates below six percent, on the other hand, changes in the white exposure rate had no significant effect. Smaller urban districts revealed a similar pattern, although the effect upon white losses is markedly less.[4] Nonlinear responses also were found in studies of private school enrollment in largely rural districts in the South. Threshold levels were higher, ranging from thirty to fifty percent black, reflecting in part the lower incomes and the limited ability of rural white Southern families to pay private school tuitions.

The effect of school racial composition on white losses may be influenced by several other variables as well. As noted above, large urban districts appear to display greater white sensitivity to desegregation than do small urban districts, although there is no satisfactory explanation for this difference. Second, white losses appear to proceed more rapidly in districts with larger proportions of blacks,holding constant all measures of desegregation. This phenomenon may be explained partly in terms of the common pattern of racial transition in central city residential areas and the growth of a predominantly nonwhite central city. There is also some evidence to suggest that desegregation plans involving white reassignment may have a greater effect on white losses.

Finally, whites with high incomes appear to be more likely to avoid desegregated schools than are whites with lower incomes. Table 1 shows the combined effect of income and racial composition for 1972 private school enrollment in Georgia counties. Private school enrollment rates generally are higher in counties with more high-income white residents. In addition, the nonlinear effect of racial composition is evident. In counties with fewer high-income whites, thresholds for private school enrollment occur when black enrollment in the average white student's school reaches thirty percent and again at fifty percent. In contrast, those counties with more affluent whites have thresholds at twenty and fifty percent black enrollment.[5] These findings imply that desegregation has the potential of separating students by economic status at the same time it mixes students of different races.

The relationship between desegregation and white flight must be considered in the broad context of suburban movement and residential segregation in urban areas.

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[4] Charles T. Clotfelter, "Urban School Desegregation and Declines in White Enrollment: A Reexamination," Journal of Urban Economics 6(July 1979), 352-370.

[5] For similar findings from survey data, see Michael W. Giles, Douglas S. Gatlin, and Everett F. Cataldo, "Racial and Class Prejudice: Their Relative Effects on Protest Against School Desegregation," American Sociological Review 41 (April 1976), 280-288.

Table 1

Percent of Whites in Nonpublic Schools by Income and Desegregation, Georgia Counties

Percent Black in Average White Student's Public School, Corrected		Percent of Whites in Nonpublic Schools, 1972		Number of Counties
Over	Including	Counties with 0-2% of white families with incomes $25,000 or more, 1969	Counties with more than 2% of white families with incomes $25,000 or more, 1969	
0%	10%	1.3%	2.9%	12
10	20	1.1	6.9	18
20	30	1.5	15.6	15
30	40	7.0	13.9	23
40	50	11.7	12.4	23
50	60	25.6	29.4	17
60		36.1	33.2	14

Source: Clotfelter, "Implications of 'Resegregation,'" p. 842.

These findings suggest that, to the extent individual schools within a district differ in racial composition, uneven desegregation contributes to increased racial segregation within the district. Furthermore, since desegregation causes whites in central city schools to face higher proportions of blacks than are faced by whites in suburban schools, urban desegregation accelerates both white suburbanization and metropolitan segregation. No comprehensive study has been made to determine the extent to which white avoidance of desegregation contributes to residential segregation. However, a recent study of ten metropolitan areas suggests that residential patterns have become more integrated where desegregation has been carried out on a metropolitan-wide basis.[6]

Conclusion

The research I have summarized suggests that desegregation has resulted in the loss of white students from desegregating public school systems. Desegregation is by no means the only cause of "white flight," but it is one factor. To the extent that whites have made different residential choices or opted for private schools, "social dislocation" can said to have occurred. Much of the social cost of desegregation may, however, be the result of the way plans have been tailored: city-only or other "uneven" desegregation plans are much more likely to cause white relocations than metropolitan-wide plans. Of course, other costs may rise with the size of the area covered.

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6. Diana Pearce, "Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns," Center for National Policy Review, November 1980.

I would make two points in conclusion. First, the fact that desegregation plans have often have led to white flight does not imply that all forms of desegregation will result in large white losses. In particular, metropolitan plans have been relatively successful in keeping a stable school population over time. Second, the costs discussed here must be weighed alongside the benefits of desegregation. The mere fact that this policy has social costs or that some citizens object to it does not necessarily mean it should be reversed. Dams and urban expressways also have social costs, but many have been built nevertheless. The social gains from desegregation are more difficult to measure, but their importance requires a serious effort to evaluate advantages as well as disadvantages.

Senator **EAST**. Dr. McPartland?

STATEMENT OF JAMES M. McPARTLAND, CODIRECTOR, CENTER FOR SOCIAL ORGANIZATION OF SCHOOLS, JOHNS HOPKINS UNIVERSITY, BALTIMORE, MD.

Mr. **McPARTLAND**. Thank you.

I, too, will summarize my testimony in three points.

First, a brief overview. A public opinion poll showed that the American public overwhelmingly approves of the principle of desegregated schooling. Americans of all groups agree with the idea that black and white students should go to the same schools. At the same time, when citizens think about busing for school desegregation in their own localities, they think in terms of the direct costs and benefits as they see them.

In this calculation, it is often very easy to understand the immediate and obvious costs, such as extra time and expense of student transportation. It is more difficult to accurately anticipate the kinds of experiences the students will find at the end of the ride and it is especially hard to get a true expectation of the ways desegregated schooling is likely to change student outcomes or influence student abilities to build a successful adult career.

Recent research provides a more clear, correct, and comprehensive picture of student experiences and of the effects of desegregated schools on students of both immediate and long-run outcomes.

I will briefly summarize these in three points. First, concerning immediate outcomes: Research shows that in the typical case, school desegregation results in improved academic test performance by minority students with no decrease in white student test scores. It results in more positive racial attitudes by both black and white students.

The reason I am more definite perhaps than the earlier panel on the achivement findings is that I am referring to studies that do not just do a batting average count. We first try to evaluate the research in terms of its sciendific standards. Does it meet control group standards, and so on. For example, in one study, it is 40 out of 45 students that meet these standards where the student started extended desegregation in the early grades; 40 out of 45 were positive. Besides these improved studies of immediate student outcomes, recent social research has been extended to consider potential long-term outcomes of school desegregation. This work establishes a broader rationale for school desegregation policies. Instead of thinking only about how school desegregation may benefit individuals, we must also consider how desegregation contributes to the structure of fair opportunities in adult life.

It is becoming apparent that public policies that concentrate only on improving the quality of schools or reducing international discrimination would be limited in their effectiveness for solving some important adult problems, such as income inequalities and segregation in adult life.

Let me turn to two other sets of findings. In a second set of findings, research has indicated that school desegregation can provide fairer access to career opportunities by reducing important structural and psychological barriers to fair adult competition.

Specifically, school desegregation has been shown to open fair opportunities in adult life by, No. 1, breaking down barriers that channel minorities into a restricted range of traditional jobs that pay less for each additional year of education and other nontraditional jobs that minorities have not found. No. 2, opening fair access to useful social networks and information, contact, referral, and sponsorship. These are the networks that people under-appreciate to which many promising jobs are filled. No. 3, by improving minority individuals' subjective perception of fair opportunities and a personal belief that payoffs come from planning and hard work. These factors—career channel, social networks of job contracts, and the perception of opportunities—are critical for qualified minorities to be in the right place at the right time and to have a fair chance at many jobs.

We are learning that the reason we see income inequalities cannot simply be explained by differences in the skills and good education or that there are bad guys out there and there is intentional discrimination. There are these barriers in the marketplace that have to do with the type of career, network information, and perception of opportunities that are unfairly available. Evidence is growing that school desegregation opens up these fair opportunities in a way that cannot be done in other ways.

A third set of findings, briefly, also concerns long-term effects. Research has indicated that present-day student experiences in desegregated schools lay the foundation for a natural reduction of segregation in adult life and in future generations. We know that the continuing racial segregation in adult life cannot be explained simply by racial differences and economic or educational resources. Social science studies show that segregation tends to be perpetuated across stages of the life cycle and across institutions.

Students from segregated schools are more likely to be found later in life in segregated colleges, neighborhoods, and places of work, while students who have attended desegregated elementary and secondary schools are more likely as adults to live in desegregated neighborhoods, to enroll in desegregated colleges, go to desegregated occupations and firms, and to send their children to desegregated schools.

There is a social inertia where even when gaps are closed in income and educational resources, segregation persists. Early desegregation seems to be one of the few ways that we have any evidence that breaks the social inertia and creates a future where natural desegregation will occur more likely.

Let me just conclude by offering some implications I believe should be drawn from these findings for future desegregation policies. In view of the potential benefits for students and for our Nation of further school desegregation—benefits that are unlikely to be achieved from other policies and that concentrate on improving the quality of the racially isolated schools or eliminating overt discrimination in the marketplace—I believe we need more and not fewer available approaches to expand the desegregation benefits by meeting a variety of circumstances in different localities.

In some localities, carefully constructed, mandatory student reassignment programs can be effective. I believe this option must remain especially as a remedy for proven constitutional violations. By the way, my written testimony has some evidence that knowledge now exists of how to design such plans in particular localities in an effective way.

In other localities, especially where city and suburban school districts are themselves segregated, sensible programs for cross-district desegregation need to take advantage of the student spaces that have now become available due to declining enrollments. Because of the difficulties of funding and other difficulties, such cross-district programs have rarely gone very far.

I would support new legislation to assist with the funding and political difficulties to encourage directly metropolitan programs that I think would be very worthwhile. I believe we need a variety of programs, and a bill that would reduce these options it seems to me is going in the wrong direction.

Senator EAST. Thank you.

[The prepared statement of Mr. McPartland follows:]

PREPARED STATEMENT OF JAMES M. MCPARTLAND

Mr. Chairman, members of the Subcommittee, my name is James M. McPartland, and I have been conducting research for several years at Johns Hopkins University on the social and educational impacts of school desegregation. I am pleased to have the privilege of being here today. I will summarize some principal findings from social science studies that I believe are relevant to the legislation being proposed to this Subcommittee on court mandated school desegregation, and I will offer for your consideration some of the implications I draw from these research results for future policy in this area.

There is overwhelming approval of the principle of desegregated schooling. All public opinion surveys show a steady increase over the years in support of this goal, to the point where today the vast majority of both black and white citizens favor the idea that white and black students should go to the same schools (Smith, 1981).

At the same time, citizens appear to think about busing for school desegregation in their own localities in terms of the direct costs and benefits as they see them (McClendon and Pestello, 1979). In this calculation, it is often easy to understand the immediate and obvious costs, such as extra time and expense for student transportation. It is more difficult to accurately anticipate the kinds of experiences students will have within an actual racially mixed school. And it is especially hard to get a true expectation of the ways desegregated schooling is likely to change student outcomes or to influence students' abilities to build a successful adult career.

Recent research provides a more clear, correct and comprehensive picture of student experiences in racially mixed schools and of the effects of attendance at desegregated schools on a wide range of important student outcomes. While early desegregation research was able to look at only a few outcomes with limited data, social science research in recent years has been able to address the following more complex and important questions:

1. What are both the immediate and long run effects of attendance at desegregated schools?

2. What are these effects in the *average or typical* desegregated school? What kind of balanced picture emerges when we combine the best, worse and usual cases?

3. What are the *optimum* conditions for beneficial effects from attendance at desegregated schools? Are techniques and materials available to create the best conditions in a practical and dependable way?

4. Which of the beneficial effects of school desegregation may be accomplished in other ways through alternative educational approaches and which benefits depend directly upon student experiences in racially mixed schools?

Immediate Student Outcomes

Students' academic achievement and racial attitudes are the *immediate* outcomes of desegregated schooling that have received the most

Research shows that in the typical case, school desegregation results in improved academic test performance by minority students with no decrease in white student test scores, and more positive racial attitudes of both black and white students. These conclusions are based on recent studies that have improved upon previous research by using relevant nationwide information covering a more representative range of conditions. In the case of academic achievement, 93 separate studies were examined and evaluated for their scientific merit before arriving at general conclusions (Crain and Mahard, 1981). In the case of racial attitudes, data were used from a recent National Assessment of Educational Progress that provides a representative sample of students and schools from all parts of the country (Scott and McPartland, 1979). In both cases, the data indicate that student experiences in the typical desegregated school result in positive outcomes in achievement for minority students and in race relations for all students.

These positive benefits are especially strong and dependable under specific conditions of school desegregation. The positive minority student academic achievement gains are particularly large and consistent when their school desegregation experiences begin in the early elementary grades and continue through high school (Crain and Mahard, 1981). The positive impacts on both black and white students' willingness and ability to interact successfully with members of the opposite race are most effectively developed when their desegregated schools use instructional approaches that emphasize students working together in the classroom on cooperative learning goals (Slavin and Madden, 1980). These classroom techniques, including a set of approaches known as "Student Team Learning", are now widely available with practical and inexpensive materials, and have been successfully implemented in hundreds of desegregated schools in all parts of the nation (Hollifield and Slavin, 1981).

Long-term Outcomes

In addition to the improved studies of immediate student outcomes, recent social research has been extended to consider potential long-term outcomes of school desegregation. This work establishes a broader rationale for school desegregation policies. Instead of thinking only about how school desegregation may benefit individuals, by increasing student test scores or reducing prejudice, we must also consider how desegregation contributes to the structure of fair opportunities in adult life. We are finding out how the racial isolation in present day American education is delaying progress on the national problems of the continuation of race and sex inequalities in adult career success and the perpetuation of segregation in American communities and institutions.

The usual social science explanations for these problems have concentrated on differences in educational skills and personal resources held by race and sex subgroups, or on the problems of overt discrimination in housing and labor markets. This nation has indeed made major steps foward in reducing race and sex gaps in educational skills and credentials and in elminating intentional discrimination against minorities. But these steps have not produced the expected improvements in income disparities and racial segregation of communities and institutions. It is apparent that public policies that concentrate only on improving the quality of schooling and reducing intentional discrimination will be limited in their effectiveness for solving the continuing income inequalities and segregation problems in adult life. Recent research has suggested that public policies to encourage school desegregation can help to address some of the underlying conditions of income inequalities and adult segregation that are difficult to penetrate in any other way.

Research has indicated that school desegregation can provide fairer access to career opportunities, by reducing important structural and psychological barriers to fair adult competition.

To understand the sources of race and sex inequalities in employment and income, we need to go beyond the explanations that focus only on intentional discrimination and the quality of schooling for job preparation. To be sure, the elimination of overt discrimination and unequal schooling remain important national priorities. But serious race and sex inequalities will remain after these problems are solved unless we also find ways to deal with specific exclusionary barriers that unfairly restrict the career opportunities of minorities.

There is growing evidence of the importance of systemic exclusionary processes that inhibit qualified minority group individuals from ever appearing in the first place as applicants for desirable positions, due to their position in society as members of a racial or ethnic minority. Although these processes may not be created intentionally, they nonetheless channel minorities in less promising career directions, exclude minorities from avenues of access used by other groups, and create burdens that foreclose minorities' consideration of potential opportunities (McPartland and Crain, 1980). I will list three examples of barriers to equal opportunities, and describe how school desegregation is related to these issues.

First, minorities continue to be overrepresented in a restricted range of types of occupations, and these so-called "traditional" fields of work offer less income payoff for each additional year of eduactional attainment than other occupational fields where minorities are underrepresented (see, for example, Gottfredson, 1978a; Kallenberg and Sorensen, 1979). As a Congressional Budget Office study (1977) concluded: "Before the large part of the overall (racial) income disparities is removed, the occupational distributions, and particularly the distributions within subcategories of the major occupational groups, must be equalized."

School desegregation appears to be an effective way to encourage a more rapid movement of minorities into the nontraditional fields that have frequently been closed to them in the past. The school years are especially important for developing career goals. Research shows that racial differences in occupational choices first occur during the junior and senior high school ages (Gottfredson, 1978b). Another study indicates that black males who had attended desegregated high schools were more likely to wind up in nontraditional mainstream careers in sales, crafts and the professions than those who had attended segregated schools (Crain, 1970).

Second, good jobs are often found through the use of informal networks of information, contacts and sponsorship, which appear to be less accessible to minorities in segregated environments. Recruitment, hiring, and promotion prcatices of firms often use important social networks to locate and evaluate candidates. Unless minorities are tied into these networks, they may rarely be "in the right place at the right time" to become applicants for promising positions (Rossi et al., 1974). Some evidence exists that school desegregation opens fairer access to useful networks of information, contacts, referrals and sponsorship, and thus contributes to more equal opportunities for career success (Crain and Weisman, 1972; McPartland and Braddock, 1981).

Third, the perception of opportunities creates the psychological conditions through which an individual approaches the labor market. When an individual expects to face discrimination in a career line or in a firm -- even if this expectation is incorrect, out-of-date, or overstated -- it is unlikely that the individual will bother to explore many possibilities in that area. On the other hand, an individual who begins with a strong sense of opportunity can draw upon this strength to build a craeer in a wide range of areas. Repeated studies have shown that blacks and other minorities have a much lower sense of opportunity than whites, and feel less personal control over their own destinies (Coleman et al., 1966). While this often reflects the realities of differences in employment opportunities, research also indicates that school desegregation serves to reduce the racial gaps in perception of opportunities. Minority students who graduate from desegregated schools have been found to feel a greater sense of control over their own fate and a more positive sense of opportunity. Research also suggests that students' school desegregation experiences *directly* improve these perceptions, and that upgrading the quality of schooling in a segregated setting would not have the same impact (Coleman et al., 1966; McPartland, 1968).

Thus, there is a growing awareness of important structural and psychological barriers to fair competition that continue to inhibit the progress of minorities, and a growing interest in how school desegregation can assist with these problems. Research indicates that it will not be sufficient to depend upon policies for improving school quality or eliminating overt discrimination to deal with these issues. On the other hand, school desegregation appears to be an important mechanism for reducing specific exclusionary barriers that contribute to race and sex inequalities in employment and income.

Research has indicated that present day student experiences in desegregated schools lay the foundation for a natural reduction of segregation in adult life and in future generations.

We know that continuing racial segregation in adult life cannot be adequately explained by racial differences in economic or educational resources. The racial segregation of neighborhoods is not primarily caused by racial differences in economic resources available to obtain housing in different localities (Taeuber and Taeuber, 1965). Blacks and women continue to be concentrated in a restricted range of occupations, which cannot be accounted for by differences in the educational requirements of different jobs and the educational resources held by different groups (Congressional Budget Office, 1977; Dawkins et al., 1980). And, the racial separation of enrollments in college today and racial differences in major fields of study in college are only partially due to differences in student qualifications for admission

(Thomas, 1981). In each of these major adult institutions, after we account for racial differences in relevant personal resources, we find that forces of social inertia impede the breakdown of racial segregation in adult life.

Social science studies show that segregation tends to be perpetuated across stages of the life cycle and across institutions, so that students from segregated schools are more likely to be found later in life in segregated colleges, neighborhoods and places of work, while students who had attended desegregated elementary and secondary schools are more likely to choose to live in desegregated neighborhoods, to enter desegregated occupations and firms, and to send their own children to desegregated schools.

The research showing how elementary and secondary school desegregation contributes to desegregation in adult life is based on analyses of national data sources that provide information on the same individuals at several points in their life cycle. The first studies showing that black and white graduates of desegregated schools are more likely to live as adults in desegregated neighborhoods and to have children in desegregated schools, used a representative sample of adults that included data on their earlier experiences in segregated or desegregated schools (U.S. Commision on Civil Rights, 1967). Recent overtime data on high school graduates was used to show how elementary and secondary school desegregation influences black students to enroll in desegregated colleges (Braddock, 1980; Braddock and McPartland, 1981). Other recent studies that followed up black college students show how earlier experience in desegregated elementary and secondary schools is positively related to employment in desegregated work groups and to the development of racially mixed adult friendship groups (Green, 1981).

Thus, there are impressive indications from social science research that student experiences today in desegregated elementary and secondary schools represent an effective investment towards the future desegregation of adult communities and institutions. In this sense, policies to continue and expand the opportunities for students to pursue their education in desegregated schools can be expected to result in more naturally desgregated labor markets, neighborhoods and schools in the future.

Implications for Future Desegregation Policies

In my view, the most important unanswered question is *not* whether student experiences in desegregated schools usually result in desirable outcomes: the research evidence is impressive that students who graduate from racially mixed schools often are better prepared for adult roles and will encounter fairer career opportunities and less segregation in their adult lives. Indeed, it is doubtful that many important beneficial outcomes of school desegregation experiences can be achieved through other policies such as improvement of school quality or elimination of overt discrimination. For example, school desegregation may be a necessary ingredient to open up fairer career opportunities, to penetrate barriers to adult neighborhood desegregation, and for students to develop skills at working successfully in knowledge about how to establish the best conditions in a desegregated school to obtain the desirable outcomes.

A more problematic issue is how to expand the opportunities for more students to pursue their education in a desegregated school, especially given the current demographic and political realities that find many black students concentrated in predominantly black city school districts and many white students concentrated in predominantly white suburban school districts.

As with most complex practical questions, we will probably need a variety of approaches to be used in different localities to address the problems. In some localities, carefully constructed student reassignment programs can be effective, and I believe this option must remain, especially as a remedy for proven constitutional violations. In other localities, sensible programs for cross-district desegregation may effectively take advantage of student spaces that have become available in suburban districts due to declining enrollments, or specialized instructional programs may be established to be shared by neighboring districts. Experienced educators could be expected to develop a wide variety of other worthwhile alternatives, but unfortunately, at this time, few cross-district alternatives for desegregation have been designed and evaluated. Because the difficulties of working across jurisdictions and funding limitations for new programs are partly to blame for this situation, new legislation would be very worthwhile to encourage and support progress in cross-district school desegregation.

/ In view of the potential benefits for students and for our nation of further school desegregation, I believe we need more, not fewer, available approaches to meet the variety of circumstances in different localities. I also believe that, with an appropriate emphasis on how effective school desegregation is linked to goals of equal opportunities and community development, public acceptance will exist for a variety of programs to extend the opportunities for further school desegregation.

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Senator EAST. Dr. Farley?

STATEMENT OF PROF. REYNOLDS FARLEY, POPULATION STUDIES CENTER, UNIVERSITY OF MICHIGAN, ANN ARBOR, MICH.

Mr. FARLEY. Thank you very much, Senator East, for the opportunity to testify.

I am a demographer at the University of Michigan's Population Study Center. Most of my work has described racial differences in the United States. Most recently, I have looked at the question of school integration and white flight as it may occur when schools are integrated.

I would like to speak to three of the findings stated in this bill.

The first finding contends that the assignment of students to school on the basis of race leads to a greater separation of the races. Stated differently, this is the argument that busing leads to greater residential segregation.

I think there is no convincing evidence to support that finding. Racial segregation in cities of the United States existed long before there was any effort to integrate schools.

We have excellent histories of the development of black ghettos in Northern cities, and some Southern cities. They all stress that long before the depression decade, a variety of forces brought about high levels of segregation.

Similar to European immigrant groups, the blacks who came to cities lived in a limited area. Unlike the European immigrant groups, blacks remained concentrated in one area and levels of residential segregation remained very high.

Thirty to fifty years ago, you would not find very many racially mixed areas in cities, just as is the case today.

Rather than exacerbating residential segregation, there is some limited evidence that school integration may lead to lower levels of residential segregation. That is, people select a place to live, at least partially, on the basis of the schools in that area.

In most metropolitan areas, neighborhoods are color-coded so that realtors, bankers, and prospective home buyers know which areas are appropriate for whites and which are appropriate for blacks. Schools help in making that color identification.

Certainly it is going to take a thorough analysis of last year's census data, but there are several studies from Charlotte, St. Petersburg, and a number of other locations in which the schools were integrated by court order.

There is at least limited evidence that residential segregation decreased after the schools were integrated.

The second finding in this bill suggests that racial imbalances in public schools are often the result of economic and sociologic factors rather than past discrimination by public officials.

This implies that schools are segregated because blacks and whites live in different areas. It further suggests that the reason there is residential segregation is that blacks typically earn less and have fewer assets than whites.

Economic factors do not explain racial residential segregation. They play no more than a minor role in explaining why blacks and whites live in different areas and why whites generally live in the suburbs and blacks are often in the central cities.

Cities in the United States are much more segregated by race than they are by economic status or by ethnicity. If you think about it for a minute, in almost all cities, one recognizes that well-to-do blacks live in a very different area than equally prosperous whites and poor blacks typically live in a different area than poor whites.

If people were distributed on the basis of income rather than the basis of skin color, there would be a great deal of residential integration in the cities of the United States.

There is a third issue which emerges from several of the findings and perhaps is directly mentioned in the first finding in this bill. This concerns the issue of white flight.

We often read press reports which suggest that school integration is one of the primary causes of the decline in white enrollments in central city schools and one of the chief causes of the racial transition which has occurred in large cities. There is no doubt that white enrollments have fallen sharply in many cities. The changing racial composition of public city schools, however, is not exclusively or primarily the result of school integration.

To be certain, demographic studies of white flight demonstrate that when an extensive integration plan is implemented, there is often an unusual decline in white enrollment. Many—and in some cases, it is less than many—of the white students who are assigned to formerly black schools in black neighborhoods do not show up in those public schools. This incremental loss of whites at the time of integration, however, is generally small compared to the long-term declines in white enrollments in central city schools. These come about because of demographic trends.

We have had sharp decreases in fertility rates. Since the end of World War II, whites have been leaving cities and, more recently, leaving metropolitan areas, to go to outlying rural areas. Those basic trends account for the changing racial composition of central cities and their schools.

To be certain, in recent years there have been major controversies about school integration in Boston and Los Angeles, and there have been unusual losses of whites as Michael Ross mentions. I think he is incomplete in discussing the Los Angeles situation, since it was a very small fraction of the white students who were bused into largely black areas. There was a loss there, but that was a small fraction of the total white population.

In cities such as Chicago, New York, and Washington, there has never been extensive busing for integration. White enrollment in those cities has fallen off just about as rapidly as in such cities as Detroit, Boston, and Los Angeles.

It would be interesting to hear Michael Ross' comments about white enrollment trends in several of the Southern districts where there has been very extensive court-ordered integration through the use of busing. Between 1969 and 1971 in the Charlotte, Mecklenberg County area and in Winston-Salem, the Forsythe County area, there was a relatively small change in white enrollment which could be attributed to integration. This suggests there was a loss in some cities but not in other cities.

Even if this bill is adopted and even if the courts were to decide that present integration plans should be dismantled, there is very little chance that white enrollments will stabilize. The long-run demographic trends toward smaller enrollments in central city schools are likely to have an effect into the future. It does not take a research grant to know that there is a high degree of residential polarization in our society. The radio stations which play soul music have a song which very aptly describes this: chocolate city, vanilla suburbs.

When courts find that children have been denied their rights for equal opportunities in education, they must effect a remedy, taking into account the racial polarization which exists in most metropolitan areas. In many situations, it would seem that children in the past have been assigned to schools so as to maximize or increase segregation. Perhaps in such cases, the only way to remedy these constitutional violations and to provide equal opoportunities is to reassign students. This would seem to be prohibited by this bill.

Thank you very much.

Senator EAST. Thank you, sir.

[The prepared statement of Professor Farley follows:]

PREPARED STATEMENT OF PROF. REYNOLDS FARLEY

Thank you very much for the opportunity to testify. I am a demographer at the University of Michigan's Population Studies Center. Most of my research describes the social and economic differences which distinguish blacks and whites in the United States. For several years, I have studied the extent of racial segregation in the public schools of the Nation's largest cities, whether the integration of public schools leads to "white flight" and the relationship of school segregation to residential segregation.

I would like to speak to several of the findings which are included in this bill, "Neighborhood School Transportation Relief Act of 1981." First, the initial finding contends that the assignment or transportation of students to schools on the basis of their race or color leads to a greater separation of the races. Stated differently, this is the argument that busing for purposes of school integration leads to higher levels of racial residential segregation.

There is no convincing evidence to support this finding. Racial residential segregation in cities of the United States emerged long before there were any major controversies about the integration of public schools. We have excellent histories of the development of black ghettoes and racial segregation in such northern cities as Boston[1], Chicago[2], Cleveland[3], Detroit[4], New York[5], and Philadelphia[6] and Atlanta[7] and Washington[8] in the South. They all stress that long before the Depression decade a variety of factors including real estate practices, municipal ordinances, Supreme Court decisions and even violence made it extremely difficult or impossible for blacks to live in white neigh-

Note.--Footnotes appear at end of the statement.

borhoods. Similar to European ethnic groups, the first black migrants to arrive in northern cities were concentrated into one area. However, blacks and European migrants differed in what happened thereafter. Over time, ethnic groups dispersed themselves throughout the city and their isolation from the native white population decreased.[9] Blacks, on the other hand, remained isolated from whites and thus levels of racial residential segregation remained very high. Thirty, forty or fifty years ago it was just about as difficult to find racially mixed neighborhoods in cities as it is now.[10] It is erroneous to assume that busing for school integration is the major cause of the racial residential segregation which typifies this Nation's metropolises.

// Rather than exacerbating residential segregation, there is some evidence that school integration may lead to decreases in racial residential segregation. That is, people select a place to live at least partially on the basis of the schools in that area. In most metropolitan areas, neighborhoods are color coded so that realtors, bankers, municipal officials and prospective home buyers know very well which areas are appropriate for blacks and which are appropriate for whites. Public schools are used to assist in the racial coding of neighborhoods.[11] If the public school system is thoroughly segregated by race, prospective buyers can easily select racially isolated areas thereby maintaining or increasing racial residential segregation.

A thorough investigation of this topic awaits release of detailed data from last year's census. However, a number of studies have been carried out in locations where the public schools were integrated, usually by court order. These places include Charlotte, St. Petersburg, Louisville, Greenville in South Carolina and Riverside and San Bernadino in California. They suggest that racial residential segregation decreased, rather than increased, after the public schools were integrated.[12]

I wish to be careful when asserting that public school integration leads to residential integration. There are more than 15,000 school districts in this country and 318 metropolitan areas. Not all integration orders have been successful and undoubtedly one can find areas in which school integration was followed by a rise rather than a decline in residential segregation.

The second finding in the "Neighborhood School Transportation Relief Act of 1981" implies that racial and ethnic imbalances in public schools are the result of economic factors. I believe this is the contention that schools are racially imbalanced because whites and blacks live in different areas and that this residential segregation comes about because blacks typically earn less money and hold fewer assets than whites.

Economic factors do not account for racial residential segregation. They play no more than a minor role in explaining why blacks and whites live in different areas of the city or why whites are very much more likely than blacks to live in suburban rings.[13] The histories of urban America lucidly point out that racial residential segregation did not come about because of the unrestrained operation of a color-blind housing market. Rather, a variety of decisions were made and policies were developed to designate some neighborhoods for blacks and others for whites. As an outcome, cities in the United States are much more segregated by race than they are by economic status or by ethnicity.[14] If one thinks about it for a moment, you realize that well-to-do whites and equally prosperous blacks generally do not share the same residential areas. Similarly poor blacks and poor whites tend to live in different areas. If people were residentially distributed on the basis of their income rather than on the basis of their skin color, most areas would have numerous black and numerous white residents. Central cities would have many more whites and suburban rings would be racially integrated. In such a circumstance, it would be unnecessary to assign students or transport them away from their neighborhoods to protect their constitutional rights.

There is a third issue which appears in the findings section of this bill. Although it is not explicitly stated, several of the findings imply that if court-ordered school integration had not taken place, central city public schools would now be very different than they are. Quite often we read reports in the press which suggest that school integration is the primary cause of the decline in white enrollment in central city schools and one of the chief causes of the racial transition which occurred in large cities.

There is no doubt that white enrollments have fallen sharply in many cities. As a result, whites now represent a small fraction of the enrollment in these places. By the fall of 1978, only one public school student in 25 in Washington was a non-Spanish white. In Atlanta, about one in 10 was white, in San Antonio, Detroit and New Orleans, about one student in seven was white while in Chicago, Houston, New York and Los Angeles, whites made up about one-quarter of the enrollment.[15]

The changing racial composition of central city public schools is not exclusively or primarily the result of school integration. To be certain, demographic studies of "white flight" demonstrate that when an extensive integration plan is implemented, there is often an unusually large decline in white enrollment.[16] Some--perhaps many--of the white students who are scheduled for busing into predominately black schools in black neighborhoods quit the public school system. This incremental loss of whites, however, is small compared to the decreases in white enrollment which come about because of declining fertility rates, the aging of the white population in most cities and the migration of many whites away from cities. That is, throughout the post World War II era, whites have moved from central cities to suburban rings.[17] In the 1970s, a new pattern developed as many people left the large metropolitan areas and moved to rural locations in the Ozarks, in Appalachia or in upper Michigan.

Long run demographic trends--declines in fertility, the shifting distribution of whites and the very rapid growth of the Spanish population--rather than school integration account for the changing racial composition of central city public schools. Racial integration played some role in certain cities but it has generally been a limited role. Perhaps this can be illustrated by looking at change in white enrollments in the public schools of different types of cities.

In recent years, there have been major controversies about school integration in Boston, Detroit and Los Angeles. In each of these cities, courts eventually ordered the busing of students to achieve integration. Between 1967 and 1978, white enrollment fell by 55 percent in Boston, by 74 percent in Detroit and by 54 percent in Los Angeles. Nationally, white enrollment in public schools dropped by only 7 percent, so we find that places with court-ordered busing lost unusually large fractions of their white enrollments.[18]

In such cities as Chicago, New York, Washington and Atlanta, very few--if any--children were reassigned and bused to achieve integration. Nevertheless white enrollments in these cities fell rapidly in this same span; a drop of 56 percent in Chicago, 46 percent in New York, 62 percent in Washington and 84 percent in Atlanta.

The national trend toward smaller white populations in the largest cities is evident both in places with court-ordered reassignments and in cities without them. Even if there are no new court orders for school integration and if present integration programs were terminated, the long run demographic trends will persist and white enrollments in most central cities will decline.

Within the last 35 years there has been a major effort to end unconstitutional racial segregation in public schools. Those who have worked with school boards or entered the courts seeking equal opportunities can point to spectacular achievements. Throughout the South there are metropolitan areas where schools were desegregated with the loss of few white students and where integrated schools have operated harmoniously for a decade. In many small and medium-sized cities in all regions, the dual school system was dismantled and black and white children now attend the same schools where they are taught by an integrated staff.

The litigants who sought civil rights must, however, also admit some spectacular failures. In many of the Nation's largest cities, racial segregation in the public schools is now as great as it was a decade ago and, perhaps, as great as it was 27 years ago when the Brown decision was given. It does not take an expensive research grant to know that, just as the Kerner Commission reported in the late 1960s, racial polarization is common within the Nation's largest metropolises. Black and Spanish residents are most often found in the central city and within a few suburban enclaves while whites typically live in the suburban ring. The soul music radio stations play a song which aptly describes this polarization; that is, Chocolate City, Vanilla Suburbs.

When courts find that children have been denied their rights for equal opportunities in education, they must effect a remedy taking into account the racial polarization which exists in most metropolises. There is no single type of school segregation nor is there any one remedy which is ideal for all locations. In some areas, redrawing attendance zones, developing magnet schools or even using voluntary plans may mitigate segregation. However, in many locations children have been assigned to public schools so as to perpetuate racial segregation. Assigning children to other schools and providing them with transportation may be the only feasible way to end such segregation. If enacted, the "Neighborhood School Transportation Relief Act of 1981" will greatly constrain the ability of courts to provide equal opportunities.

Footnotes

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   Seth M. Scheiner, Negro Mecca: A History of the Negro in New York City, 1865-1920. New York: New York University Press, 1965.

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12. Pearce, 1980.

13. Karl E. Taeuber, "The Effect of Income Redistribution on Racial Residential Segregation" *Urban Affairs Quarterly* (September 1968); Taeuber and Taeuber, 1965: Chapter 4; Albert I. Hermalin and Reynolds Farley, "The Potential for Residential Integration in Cities and Suburbs: Implications for the Busing Controversy," *American Sociological Review* (October 1973).

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15. U.S. Office for Civil Rights, *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Groups*. Tape files of data for 1968 through 1978.

16. David Armor, "Busing and 'White Flight'", *The Public Interest* (Fall 1978).

    David Armor, "White Flight and the Future of Desegregation" in Walter G. Stephan and Joe R. Feagin (eds.) *Desegregation: Past, Present, and Future*. New York: Plenum, 1979.

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Senator EAST. I would like to make a few generalizations based upon all the testimony. Then I would invite a response or two from any of you who feel pressed or interested in responding. I think most of you had the benefit of the earlier panel also, so that we can begin to piece together a whole here.

I would like to make several observations on this matter of alternatives to lower Federal court-ordered busing to achieve racial balance. I think it has been brought out here this morning that there are voluntary options in terms of inducements—magnet schools and, frankly, even evolution and choice—which over time will continue to bring about desegregation in American society—perhaps not at the pace that given individuals would like but certainly the momentum has been there.

Also I would argue, as an alternative in terms of compulsion, that this bill of course would leave local school boards free to compel busing if they wished to do so. It would leave State courts the power to compel busing if they wished to. Also, I would note it would leave lower Federal courts with the power to supervise, for example, or look at school district lines that is, where it could be shown those were being designed with a calculated pattern to lock in segregation. It could look at funding of schools; it could look at placement of schools.

To get back to my earlier remark, all it is eliminating—and some might say that is a great deal, but putting it in focus here—is the court-ordered busing for purposes of achieving racial balance. Frankly, it is the busing issue that is primarily at stake here. More particularly as has been brought out, and which I would like to stress, it is the coercive mandatory aspect of it.

As Dr. Clotfelter, I think, has very properly pointed out, one can produce figures and statistics on this sort of problem. They are useful and valuable, but they do not necessarily tell you what your policy answer ought to be. As a matter of democratic political theory, how far can you go in coercing the population of the country or of a State or an area or community where there is just implacable opposition to it—be it black, white, or both or for whatever reasons.

I am not saying I have an easy answer to it, but there are limits in a democratic society and representative government as to how far you can coerce the citizenry. We will continue to hear, and properly so, figures and statistics on this problem. Interestingly, the statistics and polls will show you the American people overwhelmingly—black and white—are opposed to Federal court-ordered busing.

Frankly, they are opposed to what many look upon as judicial tyranny in this and other areas. I am not saying that suggests what the answer is.

Coming, if you will, from the policymaking legislative elective political arena, I can report to scholars and bureaucrats and judges that out there in the real world of democratic politics—black and white—what we are talking about here does not enjoy much wide currency or support. At some point in the formulation of policy I think that has to be confronted by those who are not directly accountable in the policymaking legislative arena. What response do you give to us who must live in a real world of real sentiment and real conviction. What are the limits of coercion I guess is what I am asking in a democratic society in something as fundamental to the community as this is.

Having been a political and social scientist and lawyer by training, I sometimes wonder whether we in the social sciences are not often trying to take techniques and methods which are quite appropriate in the natural sciences and trying to make them applicable to people and humans. It is treacherous water. I think it narrows the focus and sometimes one loses sight of what one is doing.

One is dealing with people—individuals, families, and communities. One is not dealing with a beast of burden. One is not dealing with cattle, pigs, and chickens. One is dealing with people and all the complexity that suggests—communities, people, values, and coercion. Again, I might refer to Burke or someone of his kind. I am just throwing out some of these things to suggest the enormous complexity of it from the standpoint of someone who is in the political arena.

It does not yield up its mystery or solution easily to elitists—and I use it in a neutral sense—either in the courts or the bureaucracy or frankly in the academy who seem to be thinking of people as artifacts and as things to be arranged. I can imagine what some of our more distinguished and realistic political theorists of the Western world would say at hearing this sort of thing. I think they would be somewhat appalled at people who were serious students—and I am not talking about you, gentlemen; I am talking about the whole question—that serious students of humankind would not be able to see the total complexity of this, in terms of what we are trying to do by coercing people into patterns of life in a democratic society and a representative government that they find wholly alien and unacceptable.

I would think that we need more studies, perhaps, by social scientists as to how those who must work out in the real world of democratic politics might deal with this. It is not enough simply to say: Why do you not try to lead? You can only lead people so far in the things they find repugnant. On the other hand, you simply cannot counsel to yield to elitist edicts. They find that unacceptable.

We grapple in a very different world. It does not lend itself easily to statistics and to elitist evaluations in judgment and edicts. I think it is one of the reasons why, because there has been so little legislative contribution to this very fundamental policy question, that we find ourselves in this tangled web and, frankly, one of the reasons why it is here before the U.S. Congress and the Judiciary Committee.

Let me end on this question, because I have really responded—just to let you have some sense of my feeling on this which I hope is helpful to you, and at least it is helpful to me to somewhat get my thinking organized—and that is what you are here for—to help us all get our thinking organized or to get it a little more firmly in focus.

What are the limits of coercion on something like this in a democratic society?

Mr. McPartland. May I just comment about the public attitude, as you describe it. To add to your facts on the polls that you quite correctly say do oppose busing in this country, contrast that with two other facts. One is that the same polls show the great support of the principle of black and white students going to the same school.

Much of the withdrawal that may be due, in certain situations, to desegregation orders occurs before the parents and children ever experience the schools themselves. I am saying that it is a public information problem in a way. The expectations of what is ordered as a court remedy sometimes guide the behavior more than the actual reality.

If it could somehow ask the parents and children to try it for a week, I think the public misinformation would be a much less serious problem. In part, what the public sees as coercion is a misperception. It is an anticipation of a situation that in reality does not exist or where they would not find the horrors that they expect.

Mr. Ross. I would like to comment on two issues.

One is that I do count people in my research. We have the only research that has looked at individual families and their response to court-ordered school desegregation over a 3-year period in Los Angeles and 6 years in Boston.

Their response is extremely complex. You will find families with one child in a district school and one child in a magnet school and one child in a parochial school. It will rotate them around in a way to avoid a choice of a school which they do not feel is appropriate. This is where I come to my conclusions that the limits have been demonstrated.

In contrast to the surveys in Professor McPartland's studies, I have looked at what the parents actually do—not what they say they want to do. Approximately 60 to 70 percent of them will find a way to avoid or evade a mandatory reassignment. It does not necessarily have to do with going to minority schools. In Los Angeles, the no-show rate at other white schools is equally as high. The survey data in Los Angeles has testified to this.

The most important question that distinguished parents who complied or evaded was the response to the question: What would they do if they were assigned to another school mandatorily in a white neighborhood and not a black neighborhood? It is on the basis of strong evidence that it is purely the mandatory component of it that is responsible for the withdrawal.

At the same time, the response and creative adaptation these parents show——

You can emerge that type of response into some more flexible policies and obtain reasonable desegregation.

Mr. **Clotfelter**. I will not attempt to answer the very hard sincere question that you have posed, any more than I would in my role as a citizen.

In my role as an economist on this panel, I would just throw out one counter-consideration. Again, I do not have the answer to it. What happens to the children in Raleigh and Wake County who appear to be engaged in a cooperative and successful integration scheme in which racial isolation has been dramatically reduced from 1970? There is no white flight that one could measure.

If a bill were to have the effect, intended nor not, to dismantle some of the desegregation that has been built up, what is going to happen to the children who were previously in isolated situations. It is a difficult question on both sides.

Senator **East**. That is true, and I appreciate that.

However, it seems that some of the argument here, based upon the idea of coercion, ultimately falls back on this rationale—though it is not quite expressed as such, it is implicit—that man is a resilient creature and learns to accept and live with that which it did not want originally, it still does not like, and would prefer to be rid of. However, it makes the best of an unwanted situation. Sometimes that is offered as evidence that this works and is ultimately accepted. I would offer it rather as evidence of acquiescence in something over which one can no longer obtain control or one no longer has control. You yield to it.

I was interested to know from the earlier testimony that Dr. Hawley acknowledged that he agreed with No. 5 here to the extent that it undermines community support for public education. That is somewhat of angling in on a point I have been making about this matter of the—

[Pause.]

Senator **East**. This is the only institution outside of high school which works on a bell system. [Laughter.]

People who are visiting wonder what is wrong with us. You are right; I sometimes wonder too. When the bells start ringing, life stops. We lose our train of thought, and maybe that is just as well. [Laughter.] Everyone is spared.

As I recall, I was pursuing this line that people will yield and will acquiesce and man is resilient. Hence, they endure it. Then I was pointing to this matter of community. Dr. Hawley indicated that it undermines community support for public education—an interesting observation for even he, who is probably at the moment one of the better-recognized supporters. I saw him on national television the other day on this matter of the benefits of integration. So much of this seems to assume that you are coercing and forcing and that it does go contrary to many strongly felt community sentiments—even to the point of undermining support for the local community.

I find that there does not seem to be quite the sensitivity to the implications in democratic political theory and ultimately in eroding away public confidence in it and eroding away public confidence in its local institutions, even though people may endure it and even though you may be able to isolate and verify certain benefits of some kind—be it black or white or whatever.

I do not wish to sound evasive about it or unwilling to look at facts. I simply find in something as complex as man and community, that facts can only take you so far. Then you have to fall back on your general understanding of the nature of man and your general understanding of the nature of community and as a matter of social science, a profound appreciation of the infinite number of variables at work in the human social equation that we simply cannot isolate and weigh.

The moment we pick out one and focus on it and give it our exclusive preoccupation, it gives the appearance of science—be it achievement or whatever.

Actually, one senses, I think in the very true fundamental sense of science, perhaps in the classical Greek, that it is scientism. You are really not being very scientific because you have lost perspective on the whole of this thing which is enormously complex and intricate.

I have often felt that the issue of mandatory busing brings a very fundamental problem of the student of social science and one in the practical political arena into very sharp focus.

Your testimony this morning, and now into the afternoon, I appreciate. It has been very useful, and I regret, as always, that our time is so limited. You have all made excellent contributions. They will be a part of the record. This is really just the beginning of the dialog, I am sure.

Tomorrow we will be turning our attention to the constitutional implications of this, over which we shall promptly find reasonable minds also will differ. That is what makes the world of democratic politics go round, I suppose.

Unless one of you gentlemen has a pressing final point you would like to make—I did not want to have to end solely on my observation—maybe someone would have a final brief point they would like to make, feeling that maybe we have left something out.

[No response.]

Again, I thank you for coming.

Mr. **Ross**. Thank you.

Mr. **Clotfelter**. Thank you.

Mr. **McPartland**. Thank you.

Mr. **Farley**. Thank you.

Senator **East**. We shall stand adjourned.

[Whereupon, at 1 p.m., the subcommittee recessed, to reconvene subject to call of the Chair.]

COURT-ORDERED SCHOOL BUSING

THURSDAY, OCTOBER 1, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 5110, Dirksen Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Present: Senators East and Baucus.

Staff present: James McClellan, chief counsel; James Sullivan and Craig Stern, counsels; Ken Kay, minority chief counsel; and Debbie Freshwater, clerk.

OPENING STATEMENT OF SENATOR JOHN P. EAST

Senator EAST. I would like to call this session to order, please, and to welcome everybody this morning, including our distinguished panelists. I am also delighted to welcome members of the audience, and my distinguished colleague, Senator Baucus, who is the ranking minority member of this committee, and it is always a great pleasure to work with him and his staff on these problems of mutual concern.

Yesterday we began our hearings on S. 1647. We heard panelists discussing the educational impact of compulsory busing for purposes of achieving racial balance or proportion. We also heard differing points of view on the impact on the community.

This morning we are turning our attention to the constitutional implications of this bill or related bills, specifically on this question of withdrawing the jurisdiction of the lower Federal courts to issue orders requiring busing for purposes of achieving racial balance. S. 1647, there is no question about it, does withdraw the jurisdiction of lower Federal courts to issue orders requiring busing for purposes of achieving racial balance.

It purports to do that under the authority of Congress in article 3 of the Constitution to create and to eliminate the lower Federal courts. Implicit in that broad and sweeping authority is the power to define the jurisdiction of the lower Federal courts.

I would like to point out as an obvious subscriber to the bill that we are certainly willing via the hearings to get all perspectives, and ultimately a bill will have to be fashioned or designed that would suit a majority of the members of this subcommittee, assuming we will report out something, and certainly ultimately the bill would have to suit a majority of the members of the Judiciary Committee and ultimately the U.S. Senate. Therefore, no one is

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here trying to force something that would not enjoy some degree of consensus, at least a majority consensus.

However, it is true that as we move on into this question of the constitutional matter there are, as there often are in a free society, differences of opinion over things, including differences of opinion over constitutional power, whether it exists to begin with; and, second, always a valid point, whether it would be prudent to exercise it even if you did have it. Therefore, we are very appreciative—I am, as chairman of this subcommittee—of the great variety of points of view on this.

Again, as a subscriber to the bill, for perspective I would like to underscore that what this bill would do would be to withdraw the jurisdiction of the lower Federal courts on a very slender point, namely the power to issue orders mandating busing for the purposes of achieving racial balance. It is not designed, nor would I contend it could in any way, shape, or form be so interpreted to be more than that.

In short, the jurisdiction and the power of the lower Federal courts to do anything else in this area of bringing about the implementation of civil rights of all Americans, be it black, Hispanic, or whatever, would continue in its full and sweeping course. They would certainly still enjoy enormous power pertinent to the public school systems of this country.

What S. 1647 would do, I repeat, is to carve out a slender area of jurisdiction, namely the power to issue orders requiring compelled busing for the purposes of achieving racial balance. It is that particular matter that this bill is directed at, and I was attempting to argue yesterday on its behalf, whatever deficiencies it may have in it—and many will feel that it does, in terms of what it hopes to accomplish and the method by which it attempts to accomplish it—I would like to feel at least that it has the virtue, as I noted yesterday, of being simple and direct without being simplistic, and responsible in terms of what it hopes to achieve.

I hope that through my initial remarks I have suggested what it is we are trying to accomplish through the hearings, and I will let those remarks stand as my opening statement this morning. I would like to turn to my distinguished colleague for any opening remarks he would like to make and then we shall turn promptly to the witnesses.

I would like to remind our witnesses and, of course, ourselves as well, the panel here, that we do work under severe time restrictions and we would appreciate brevity and conciseness on the part of the panelists to give us your conclusions and the best and most concise rationale you can give us for those conclusions because your full statements, as you know, will be a part of the permanent record.

Unfortunately, this kind of forum does not lend itself to elaborate and detailed examination of statements. It allows us to hear conclusions and the best possible concise rationale therefor, so that we can get out of you by your physical presence here questions that we have. We can always then, and will at our leisure—a word that one uses around here very advisedly—at our leisure will be able to look at your whole prepared text.

Senator Baucus, I would be delighted to have your remarks.

STATEMENT OF SENATOR MAX BAUCUS

Senator **Baucus**. Thank you, Mr. Chairman. I will be very brief. It would probably make most sense if we listen to the witnesses and have more time so that we can ask questions of the witnesses.

The subject of this hearing is a crucial aspect of the consideraion of this bill. The issue revolves around the limits of congressional power as proscribed by the Constitution. Everyone has a different view as to how far the Congress can and cannot go in the areas of limiting either court jurisdiction or remedies. I think that all of us agree that there is a point beyond which Congress cannot constitutionally limit lower Federal court jurisdiction or remedies. The question obviously is where that point lies.

I think we all, as Members of Congress and as human beings like to exercise as much power as we possibly can. Of course, when our Founding Fathers drafted the Constitution they recognized that very salient and long-lasting part of human nature and set limits on it. They set limits on the Congress, they set limits on the executive branch, as well as on the judiciary.

Nevertheless, we are at that critical point where the judiciary and the Congress meet. I think it is important that we address the question of how to limit busing in its proper perspective. That perspective, I think, is the perspective of what makes sense for the long-term best interests of our Government and all three of its branches. I hope we can keep our focus on this vital institutional question rather than on a debate of whether or not busing is proper. I hope that that is the spirit in which we conduct this hearing.

Senator **East**. Thank you, Senator Baucus.

I then would like to welcome our first panel, made up of four distinguished scholars. We subsequently will have a panel of five, involving distinguished professors and attorneys. We welcome all of you this morning and appreciate your taking your time from your very demanding schedules to try to bring a little light to the U.S. Senate, which is always desperately in need of light, insight, knowledge, and wisdom.

I will forgo elaborate introductions here because of the time factor but I would like to underscore, and I have them in detail, the biographical and professional backgrounds of these gentlemen. I will simply say for the record, each and every one of them is a highly distinguished person in his own right. That accounts for their being here, and we will not weary you with a long list of their accomplishments, scholarly and otherwise.

We do welcome this morning Dean William F. Harvey of the School of Law of Indiana University in Indianapolis, Ind. We welcome Prof. Gerald T. Dunne of St. Louis University School of Law in St. Louis, Mo. We welcome Prof. Burt Neuborne of New York University School of Law in New York; and we wholeheartedly, of course, would recommend a fellow North Carolinian, Prof. Daniel Pollitt, a very distinguished professor and, I might note here, perhaps somewhat gratuitously, a very well-known and respected figure in my home State. He is here from the University of North Carolina at Chapel Hill, the very distinguished university, a part of our college system in North Carolina. Chapel Hill is well known.

To be evenhanded, I better not elaborate any further because we have gentlemen from other distinguished universities.

I welcome you all, gentlemen. What we would like to do, if it meets with your approval, is to let each of you speak. We will just go from Mr. Harvey to Professors Dunne, Neuborne, Pollitt, and then we shall interrogate you as a panel if we might, please.

Again I would remind you of the time restrictions, and we would appreciate your remarks freely and in extemporaneous fashion, if that is at all possible, stating what your conclusions are, your generalizations, and then give us as concisely as you can your rationale therefore, appreciating that you are not going to be able to elaborate in the detail that you would like. It gives us an idea of where you stand, why generally you stand there. Then we are in a position to begin to press you further on points that are of particular concern to us.

That kind of format will, I feel, benefit Senator Baucus and myself the most, and then we may very well have other members of the subcommittee come in. As you are well aware, there are many things that go on at one time around here so I feel honored as chairman that I have my distinguished colleague, who is very faithful in attending our hearings, I might note. Frequently you go to hearings and only the chairman is there. We appreciate his great interest in these issues and the others we have already taken up.

Dean Harvey, if you will please begin.

STATEMENT OF DEAN WILLIAM F. HARVEY, SCHOOL OF LAW, INDIANA UNIVERSITY, INDIANAPOLIS

Dean HARVEY. Thank you, Senator, and thank you for the invitation to appear before your committee this morning. I have submitted a written statement, and I submitted to Mr. Sullivan an errata sheet on that statement with a couple of corrections which I would hope will appear in the permanent record.

I perhaps should say that I was the dean of the law school at Indiana University for 6 years and I have managed to survive that exercise, and I am happy to be here this morning. Concerning this bill, I shall attempt to limit my opening remarks to about 10 minutes which I think is the spirit of your injunction and the committee's hearing.

It is the case, in my judgment, that the history of racial discrimination in the United States since 1868 has been the history of the manipulation of the power of Government to effectuate racial discrimination. That power was first recognized, although not in a race case, in the *Slaughter-House* cases in 1873, and the full impact of that power plus the doctrine of judicial review which became so prominent at the close of the 19th century eventually did effectuate the program of governmental manipulation of race in almost every dimension.

It is my judgment that today in these United States we have not changed an iota. From the beginning of this century, we have succeeded in transferring the manipulation of governmental power from the school boards or park boards or municipal boards or State legislatures into the U.S. district court system.

I certainly therefore appear in support of the bill which is pending before the committee and hopefully before the Judiciary Committee. Today in constitutional litigation under the equal protection clause, the remedy has become the wrong. Because of this, no agency of State government has ever engaged in a greater denial of civil rights under the equal protection clause than certain courts in the U.S. district court system as constituted in this day.

These courts have replaced the school boards or districts and the State statutory programs, the use of a Governor's police power, all in the use of racial criteria or racial discrimination in the denial of individual rights because of race, in the allocation of public funds and dollars because of race, and in a denial of a person's right to equal protection of his rights under the 14th amendment.

Federal court decrees deny on a wholesale basis recognition to persons, even as that word was the very purpose of the 14th amendment's adoption in its first section in the equal protection clause. This is accomplished by converting the word "person" in the equal protection clause into a class of persons, which class is usually defined by race.

After that convolution, these courts then conclude that they have power over that class after they have created the class. I suggest to the committee that there is no class remedy available in constitutional litigation under the equal protection clause if we are to honor the language of the amendment, which refers to a person in a singular form and not to a class of persons, however identified or refined that class might be.

To the extent that Federal Rule of Civil Procedure 23 appears to permit a class remedy, it is in my judgment inconsistent with the Constitution of the United States and that provision of the 14th amendment. No Federal court can order a remedy which denies a constitutional right under the 14th amendment, which is done when it acts without the express consent of the individual student affected by the court's decree.

If a school child has been subjected to racial discrimination, then only that person can request a remedy to the extent of the harm done or the right denied. We owe, in my judgment, Mr. Chairman and members of the committee, we owe to schoolchildren at least as much protection of their rights under the equal protection clause as we extend generally speaking to arrested persons under the fourth, fifth, and sixth amendments to the Constitution of the United States where, generally, rights are not lost without their known, voluntary relinquishment.

If a Federal bankruptcy court can comprehend lists of assets and claims of debtors and creditors, then it is not beyond the competency of a Federal district court to treat persons as individual persons under the equal protection clause in the 14th amendment, which means to remove that person from class status and the obliteration and oblivion which attends class status in those decrees.

I would hope to see that this committee would recommend to the full committee, and the full committee to the Senate, and that Congress would adopt a complete bar on the use of race in all assertions of governmental power, in all governmental programs, and in all governmental functions, and especially in the judicial function of the U.S. district court.

Second, I would recognize that the judicial function, quite contrary to some footnotes from the Supreme Court and particularly in the *Fullilove* decision, the judicial function is the very essence of governmental function and the use of all racial criteria in all judicial activity of every kind should be barred. This Congress should effect that legislation.

Additionally, I would urge that the Congress interpret the word "person" which does appear in the equal protection clause to mean a person as an individual—because that was precisely what was intended by Congressman Bingham, Congressman Lawrence, Senator Trumble, and all of the persons who wrote the 14th amendment and effected its adoption—as persons and not as classes of persons. There is no class remedy in constitutional litigation under the 14th amendment.

Accordingly, I would recommend—although I obviously recognize that that kind of remedy is being invoked every day, even as we sit here, but I am speaking of the legitimacy of the remedy and not the de facto existence of it—I would also urge that the committee and the Congress withdraw Federal jurisdiction in all 14th amendment school cases and defer those cases into a State court until these fundamental principles can be established by legislation pursuant to article 3 and section 5 of the 14th amendment.

Now consistent with these remarks, members of the committee, I have a couple of comments in the prepared text to which I want to allude. The first is the fact that this bill has been introduced is, in and of itself, evidence of the continuing conflict which has occurred in the social and constitutional history of the United States. It is a conflict which goes to the very center, the foundation of the American Republic, and it has to do with the concept of equality.

That concept is seriously fractured today, and it has been judicially fractured, although a definite philosophy of equality was established in both the Declaration of Independence and in the 14th amendment in 1868. The equality found in the Declaration of Independence and in the 14th amendment in 1868 was best explained by Mr. Lincoln in his debates with Senator Douglas.

It means the equality of man in his natural rights, to which all else—and particularly the functions of Government, whether a majority vote in a legislature or a derivative function such as judicial review—is subordinated. No government, no State, and no court can deny those equal, natural rights of man and remain at the same time legitimate.

It was this understanding of equality which alone destroyed the institution of slavery in the United States. It is this understanding which was the sheet anchor, as Mr. Lincoln described it, of our Republic, and it remains that same anchor today.

The concept of equality which is radically different, however—and is now plainly embraced by the Supreme Court of the United States and the Court holds that it informs the 14th amendment—is a concept in which the equality of persons and the nature of man is indeed subordinate to the doctrine of popular sovereignty and in the selection of representatives to a legislature.

This doctrine holds that it is perfectly proper for a legislature of representatives known to persons and voters to deny equality among persons entirely by legislative fiat; or, if not a total denial, then at best it does not really matter how a legislature votes on a bill as long as there was a majority voting in the legislature which represents a majority of certain persons among voters.

A second proposition which this particular philosophy of equality subscribes to is that equality can be effected for the moment, for the day, by a court decree or judicial declaration. This proposition holds that equality today might mean an allocation of public resources upon a basis from which all persons of an identifiable race are excluded from participation in the allocations, and that that is perfectly legitimate.

Tomorrow this concept of judicial equality might mean that the allocation of public resources on a basis in which 20 percent of an identifiable race shall receive 20 percent of the allocation is perfectly legitimate. On another day, this concept of judicially decreed equality might mean that there shall be a complete and total separation of persons by race among all public and, if necessary, private institutions in society. Therefore, we return to the inglorious days of the majority opinion of *Plessy* v. *Ferguson.* Or, this notion of equality might mean that there is no redress, and especially not redress in the judiciary, where there has been a total usurpation of all personal rights which occurs for the greater good of State power.

I do not subscribe, Mr. Chairman, to the latter ideas and predominant notions of equality as it does prevail today in these United States, and it is for that reason that I have made the specific recommendations with which I commenced my brief introduction and comments.

Those recommendations are, first, that the Congress and this committee find that the use of racial criteria for any purpose is not permitted under the 14th amendment's equal protection clause; that the Congress and this committee find that the use of a class remedy in class actions under FRCP 23 is not permitted as a means to enforce rights under the equal protection clause of the 14th amendment, for the reason that such a remedy violates that very amendment which protects the rights of a person. The 14th amendment does not refer to a class of things or persons or objects.

Additionally, I recommended that the Congress find that the U.S. district court system, compelled as it is by Federal appellate courts, has engaged in the displacement of personal constitutional rights by arrogating unto itself those rights which belong to persons, namely, children attending schools. A finding that a State agency of some sort has engaged in unconstitutional conduct is not a kind of writ of transfer to the U.S. district court system. If that right has been denied, then only the person who owns that right or possesses that right can assert the denial thereof.

I would urge this committee and the Congress to find, again, that only the person who has had his right denied can invoke a remedy of his choice, that is, in the context of his school system only that person can decide whether to continue as that person is now or to make a different decision, that is, to attend some other available school.

Those are my introductory comments, Mr. Chairman. As I said at the onset of my observations, I support the bill. I strongly support it, and I hope these comments contribute to the understanding of this problem. Again, I appreciate your invitation to appear here before you this morning.

Senator **East**. Thank you, Dean Harvey.

Professor Dunne?

STATEMENT OF PROF. GERALD T. DUNNE, ST. LOUIS UNIVERSITY SCHOOL OF LAW, ST. LOUIS, MO.

Professor **Dunne**. Senator East, Senator Baucus, thank you very much for the opportunity to appear in support of the bill. I would adopt everything that Dean Harvey has said. In addition, I would like to begin with a citation from Martin Mayer on the specific mischief to which this bill is addressed, namely, as Dean Harvey has put it, the substitution of communal for individual justice.

As Mr. Mayer said, "To force parents to send children to a school they consider less good than the one previously available is a decision fraught with major negative consequences * * * the worst of it has been the rebuke to the best instincts of the family and to the desire to look to the future, which is always * * * linked to children."

Elaborating on Dean Harvey's statement, these decrees constitute the grossest violations of the Constitution they are meant to enforce, and in addition the substitution of communal for individual justice violates parents' rights as set out in *Pierce* v. *Society of Sisters* and children's rights as asserted in *Brown* v. *Board.*

There is a remedy here, and that is the last sentence of the second paragraph of article 3. Without necessarily reopening the whole debate on the origins of article 3, it is surely not amiss to point out that both the "ordain and establish" predicate and the "exceptions and regulations" qualifier constitute the sole checkrein, short of impeachment and constitutional amendment, over men—not angels—who are appointed for life and accountable to nobody.

In sum, the only permissible inference is that they were crafted as such. My suspicion—and it is only that—is that this jurisdictional checkrein accounts for the failure of the framers to reenact the whole of chapter 2 of the British Act of Settlement of 1701. That act, as you know, gave judges life tenure and irreducible salaries, always subject to their removal on address to the Crown by both Houses of Parliament.

The framers, who obviously were well qualified on the Act of Settlement, wrote two of the three provisions into article 3 but omitted the third. If the jurisdictional checkreins are not to be addressed, then it can only be concluded that the judicial article which affords neither the purse nor the sword but does provide the last word over the use of both, is the unguarded flank of the constitutional design.

More important, this plenary aspect of the jurisdictional checkrein is both the original and the unbroken understanding of all three branches of the Government. This checkrein we are considering this morning has been infrequently used but when used it has been judicially validated at virtually all times.

We do have a specific precedent here. If a historian were to program the progress of this bill, he might well chart its course to arrive at the Presidential desk on March 25, 1982, which will be the golden anniversary of the Norris-LaGuardia Act and a felicitous precedent for this one. The checkrein is a temperate and precise drafting, clearly within congressional competence, which tempers a well-meaning but perverse and improvident use of injunctive remedy.

As your colleague, Senator Moynihan has insisted in, I believe it was the Herbert Lehman Memorial lecture, the American constitutional design is characterized by tension, counterweight, and friction. Here the built-in checkreins to the judiciary in the hands of the Congress can certainly effectively destroy judicial independence. As President Franklin Roosevelt has shown us, the simple use of the appointment power can do that; so can the failure to appropriate; and so can the use of the money power, the inflation power, as the recent suit of the judges in the Court of Claims has suggested.

Nevertheless, the use of the exception need not constitute the rule, and as Justice Frankfurter admonished us—

> The process of constitutional adjudication does not thrive on conjuring horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency.

This is not the case here. It has well been described in another context by Princeton's eminently respected Professor Corwin, who in discussing the subversion cases of the fifties remarked:

> The Supreme Court went on a virtual binge and thrust its nose into matters beyond its competence with the result that (in my judgment at least) * * * it should have its aforesaid nose well tweaked. * * * The country needs protection against the aggressive tendency of the Court.

That is the issue.

Senator **East**. Thank you, Professor Dunne.

Professor Neuborne?

STATEMENT OF PROF. BURT NEUBORNE, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK

Professor **Neuborne**. Thank you, sir.

Senator East, Senator Baucus, thank you very much for the opportunity to appear this morning and to express a very narrow objection to the bill that you have before you, an opposition premised on one set of facts alone the set of facts that will arise in a particular case when a Federal judge is faced with a fact pattern in which no other remedy exists which can vindicate the constitutional rights of the plaintiffs before him, other than a remedy which is named and which is proscribed by this bill.

The question, it seems to me, is not so much what the Constitution requires in this area. Reasonable people can differ, and I do not warrant that what has been done by the Supreme Court in recent years or what is done by Federal courts every day is necessarily the right answer to every problem.

The question, I think, is which institution in our Government has the final say over what the Constitution requires. What is at stake, I think, in connection with bills like this is the independence of the judiciary to act as the final arbiter of what the Constitution requires. After all, the essence of our form of government, that which differentiates it from a European parliamentary democracy, is that questions of individual right when they are elevated to a constitutional level are ultimately decided by nonmajoritarian bodies, by courts, which are insulated from majoritarian excess and which have over time established themselves as the only institution in Western government capable of defending the individual against the increasing pressures of a corporate state.

Therefore, the question is not so much whether busing is a good idea. The question is whether in attempting to deal with what is a very real social problem, Congress risks doing mortal damage to the institutional structure that relates the courts to the Congress, in such a way that we will lose the independent judiciary which has kept us free for so long and which is really the only institutional guarantee we have that we will be free in 2000 and 2020. We may do damage to the concept and the theory of an independent judiciary in the hopes of solving a short-range social problem and imposing a legislative solution to what is a judicial problem.

With that as a background, if I may, I would like to turn to the constitutionality of the bill as it stands, not so much questions of grand power, of whether or not one or another vision of equality should be adopted. The bill itself, it seems to me, raises some very serious constitutional questions as it is currently drafted.

The most obvious and the most serious constitutional question raised by the bill is the confusion in the bill's language between the notion of subject matter jurisdiction and the notion of remedy. The bill is drafted as though it is a limitation on the subject matter jurisdiction of the Federal courts. It purports to remove the jurisdiction of a Federal court to issue a particular remedy.

However, I think it is clear that merely phrasing the bill as a jurisdictional matter will not turn it into a subject matter jurisdiction regulation. It is really a regulation of remedies.

When Congress begins to regulate remedies, it moves into an area in which there are some very serious constraints on its power. Surely, when the right is nonconstitutional in nature, as it was in the Norris-LaGuardia Act, Congress has virtually plenary power to determine what the remedial scope of a particular bill should be.

However, when the right in question flows directly from the Constitution, as it does in these school cases, for Congress to deny a remedy in a Federal court when the Federal judge finds that it is the only remedy possible to vindicate the constitutional rights of the plaintiffs, is for Congress to destroy the power of the Federal judge to adjudicate the case that is before him through the back door. In other words, where Congress gives subject matter jurisdiction to a Federal judge it cannot at the same time remove the power to issue the only remedy possible to vindicate the plaintiffs' constitutional rights.

Now I am sure that you will agree with me that this is not an issue that will arise in every single case. It probably is not an issue that arises in every single school desegregation case. It arises only when the only possible remedy is a busing remedy. When the sole possible remedy is a busing remedy to invite minority plaintiffs to use that Federal court to vindicate their constitutional rights, and then to pull the trap door on them halfway through the case by having removed the only remedy possible in vindicating their rights is, it seems to me, an interference with the notion of separation of powers which animates the relationship between Congress and the judiciary.

The bill does not purport to take subject matter jurisdiction away. Indeed, I suspect that there would be very substantial objections, both political, moral, and perhaps constitutional, to a bill that would attempt to take the subject matter jurisdiction of the Federal courts away in school desegregation cases.

So long as Federal courts are given subject matter jurisdiction over these cases by Congress, you cannot, I think, consistent with the principle of separation of powers, cripple those courts by taking away the only remedial power available to them in particular cases.

Now as I said, that does not mean every case, but it does mean those few cases in which busing is the only possible remedy. Really, that is the only point of disagreement that I have with the bill.

A word about the constitutionality of the bill in terms of its attempt to enforce a right to be wholly free from racial criteria in the assignment to public schools. We have to recognize that the Supreme Court—and I do not think there will be a great debate about this—has explicitly rejected the existence of such a right on more than one occasion. A number of the cases are cited in the testimony.

The Supreme Court has indicated that, given this Nation's history, you look at modern society like a relay race. The first two legs of the relay race were run with one race in chains because of Government-imposed racial discrimination. We have finally taken the chains off but the relay race is not over, and a constitutional argument that said that race can never be used as a criterion of remedial legislation would ask the minorities of this country to run the last two legs of the relay race without help after having been required to run the first two legs in chains.

It seems to me that a Government policy that attempts merely to make up for past racial discrimination cannot and should not be viewed as a violation of the Constitution. The Supreme Court has repeatedly so held. Therefore, for Congress to attempt to enforce such a right impinges directly on the notion of separation of powers. You would be, in effect, overruling the Supreme Court.

You would be overruling the Supreme Court out of, I am sure, pure motives and a belief that you are enforcing what the Constitution requires. But the issue before us, Senators, is not what you think the Constitution requires. It is which branch has the power to say what the Constitution requires. It is the basic, fundamental aspect of our Government that that branch is the Supreme Court of the United States.

That is why bills like this have triggered such emotional opposition. Not so much because people like myself feel that busing is necessarily a good thing in all circumstances or that we ignore the fact that there are serious social problems to be dealt with, but because we sense an assault, perhaps unintentional, on fundamental principles which link the Constitution to the courts and which link the judiciary to the Congress.

I should say I do not think that the Congress is without power. Indeed, I think there is a responsibility on your part to act because I think there is a social problem which needs attention. I think in the remedial area that Congress has a number of significant responsibilities which should be exercised.

For example, there are many busing cases in which third parties are affected without ever having had their point of view put forward to the Court; where there are children in the community who are affected by the busing order who have never been able to bring to the judge's attention factors which perhaps the judge would have wished to weigh in ordering busing.

I see absolutely no problem, and indeed I think it would be an excellent idea, were Congress to require participation in the remedial phase of a school segregation litigation by all interested parties, including members of the community who would be affected by a busing order. I see no problem in appointing a guardian ad litem if necessary to represent those interests.

I see no problem in establishing a hierarchy of remedies which a Federal judge must exhaust in order to deal with this problem, with busing at the very bottom: Saying to a Federal judge, "Only if you have exhausted every other type of remedy can you go to busing as a matter of last resort." I see no problem in establishing a procedure to determine the causation issues that the *Dayton 2* case discussed, required in every one of these cases, that busing should be causally linked to some past finding of de jure segregation.

One of the muddy issues of litigation in this area is precisely what that causal link should look like, what the factual issues surrounding that causal link should be, and what the hearing should look like in establishing that causal link. I think that it would be a very constructive role for Congress to set out procedures.

It seems to me that findings on the educational impact on third persons should be required of a Federal judge before a Federal judge orders a busing order. Findings on the security impact on third persons should be required. Findings on the safety and the health impact on third persons should be required.

Indeed, were you to wish to go this far, the traditional way that Congress has dealt with problems like this is to take away from a single Federal judge the power to issue this relief and to vest it instead in a three-judge court. In the history of the struggles between Congress and the courts over many of these issues, the traditional response has not been to attempt to emasculate the courts in dealing with the problem but to try to control a single judge's discretion. Perhaps you might wish to institute the three-judge court procedure in connection with some of these remedial devices.

I simply suggest these things to point out to you that there is a host of constructive and important activity that Congress can take in connection with the busing issue short of raising very troublesome problems of confronting the Federal courts with an assault on their responsibility under the Constitution.

Thank you.

Senator EAST. Thank you, Professor Neuborne.

Professor Pollitt?

STATEMENT OF PROF. DANIEL POLLITT, UNIVERSITY OF NORTH CAROLINA LAW SCHOOL, CHAPEL HILL, N.C.

Professor POLLITT. Thank you, Senator East and Senator Baucus. I appreciate the opportunity to be here and share my thoughts on this obviously controversial matter.

I have divided my testimony in three parts, and I would sort of like to refer to it—rather, repeat it, if I might. My first part is a legal analysis of the problem. I wrote an article with Congressman Frank Thompson some 10 years ago on the proposals of then-President Nixon which very closely resemble some of the bills before you today. In that article, we referred to the *McCardle-Yerger-Klein* line of decisions, and I will not repeat them.

Professor Dunne, I thought very interestingly, pointed out that shortly we will have the 50th anniversary of the Norris-La Guardia Act which is one of the closest analogies. We discussed the Norris-La Guardia Act in our article, also the *Portal-to-Portal Act* cases, which is a close analogy, where the Congress took from the Federal courts the remedy for the overtime violations under the Fair Labor Standards Act.

We discussed those cases and we cite the appropriate language including, as far as remedy is concerned, *Marbury* v. *Madison,* where the issue was whether Marbury had a remedy to get his commission to be a justice of the peace in the District of Columbia. John Marshall, the great Chief Justice, wrote in moving language that all civilized governments have an obligation to provide remedies, and since the Supreme Court has held that a remedy is part—an inseparable part of the judicial proceedings—well, I do not want to go over those again. They are in the article, which I would like to append to my statement.

When Mr. Ken Kay called me last summer and asked me if I would be available, I was thinking about a seminar on civil rights which I have this semester and I thought, yes, I would be happy to come here because I now have a topic for my seminar. Therefore, I have encouraged the students in my seminar to help me and some of them are here today.

I have two papers on the legal issues by students. One is by David Farren, and the other is coauthored by Emmett Boney and Tim Barber. I would like to append them. I think they are very constructive, useful summaries of the arguments and of the authorities, and I think they would be helpful in reaching a correct solution.

The second part of my testimony concerns working with my students. I asked them all to submit a page or two statement of their personal experiences with busing and any reactions they might have. Three of the students were in the initial crosstown busing in Charlotte, ordered by Judge McMillan. Another student was the first white or amongst the first whites in Raleigh to be assigned to the formerly black school. A fourth student was in Durham and went to the formerly black Hillside as part of the remedial orders. Others were in more rural areas.

Well, they did write their statements, and they are short—a page or two. I have them and I would like to put those in the record as well. What they show is that busing is an expected way of getting to school. Everybody was bused except one.

There are inconveniences in busing. One of the students was Catholic and went to the parochial school, and had to go by several public schools on his way to the Catholic school. Another student was black and had to go—in her early experiences went by the white schools on the way to the black school. We had an interesting situation of one of the students who was in New Zealand in high school, and there were five high schools, only one of which was coeducational. He opted for that one and he had to ride a considerable distance on the bus, which he would not have had to ride had he gone to a different school.

Therefore, there are inconveniences in busing but they all thought that the busing was not without value. They formed friendships. It was one of the more interesting parts of the schoolday. More importantly, they formed friendships with people of the other races which they otherwise would not have had. They had contact on the bus and at the school. Without the busing the schools could not have been integrated, and the integration of the schools gave them an opportunity to learn socialization.

The typical comment is, they do not remember their plane geometry and they do not remember the poems that they had to memorize but they did have an experience in learning how to adjust to a multiracial society, so that socialization was a very valuable experience.

I also have, in this vein, an article by Tom Wicker, who tells about the dinner in Charlotte last summer honoring Julius Chambers, who was the NAACP attorney in the *Charlotte School* case, and Judge Jim McMillan, who ordered the two-way massive crosstown busing. This was on the 10th anniversary of the busing order. Ten years ago these two gentlemen were pilloried. Julius Chambers had his law office firebombed. Ten years later they were honored for what they had done. The Charlotte School Board canceled a scheduled meeting so all the members could attend the dinner honoring these two people.

I think that this reflects, a great change which has taken place, at least in Charlotte and in my part of North Carolina, over the last 20 years. We go back 20 years. We started integration in the late fifties and the early sixties and it is all behind us, and I would hate to have to go through it all again.

The third part of my testimony reflects as Senator Baucus points out, that this is far more than a busing bill. This is what I would consider a radical alteration of our system of government. Our fathers, constitutional fathers, diffused authority amongst three coordinate branches of the Government. The purpose was to preserve individual liberty. They created an independent judiciary with power and authority to decide cases arising under the Constitution.

Since the beginning, the Supreme Court has been in trouble. People have not liked the decisions of the Supreme Court, and there were efforts from the beginning to limit in some way the authority of the Supreme Court. Again, another student looked into that for me, Harriet Hopkins, and she reviewed the efforts up to 1913 from the very beginning. There were many such efforts which are set forth in her paper and I will not go into them here.

However, it certainly did not stop in 1913. We are all acquainted with President Roosevelt's Court-packing plan in the mid-1930's, and we are all acquainted with the far more recent efforts in the fifties, the sixties, and the seventies to curb the Court in areas of Federal habeas corpus, bar admissions, State subversive cases, and all the rest of them. Again, they are in my paper; I will not review them.

I have two conclusions; I have two major concerns. The first is for the system of government. If these bills are enacted into law, I think they would inflict a grievous body blow on our concept of an independent judiciary. Second, I fear for the ideals of our Republic if these bills are enacted into law. Every schoolchild learns to pledge allegiance to the concept of one nation, indivisible, under God, with liberty and justice for all.

I fear that if these bills are enacted, instead of one Nation we will have two warring camps, one black and one white. I feel that if these bills are enacted into law it would deny blacks and whites alike, or at least it will be perceived by many to deny the liberty and justice now guaranteed by the 14th amendment and 25 years of Supreme Court decisions.

Senator East, I would like to thank you as I did at the beginning for permitting me to appear. I know we have been on the opposite sides of many issues and I appreciate your graciousness in hearing me out. Thank you, sir.

Senator EAST. We thank you, Professor Pollitt, for your distinguished contribution, as well as the rest of you. This is a very valuable contribution that you are making to our effort here.

If it is suitable with my distinguished colleague here I will take a few minutes and probe a bit, and then we will let him probe a bit and see what we can make of all of this.

Two things that I would like to comment upon, and then I would be interested in brief responses from the panel or one of you, or however the spirit moves, and then I will move to Senator Baucus. First, Professor Neuborne, you, very explicitly, and Professor Pollitt also are suggesting what I would call the "remedy-right" problem that arises when the Supreme Court or the U.S. Constitution as interpreted by the Supreme Court defines a right of some kind. In order then to implement the right, the appropriate remedies must be available, and to deny the remedy—which you are suggesting we would be doing here—is in effect to deny the right, which you find repugnant and appalling.

I would agree with you if certain things were true which I do not find to be true, and would be interested in your comment on it. First of all, the right under Supreme Court interpretations of the Constitution in this area is not the right, is it, to a racially balanced school experience? The right is the right to racial neutrality. It is the right to be treated without regard to race under the Constitution. That is the point of *Brown* v. *Board*. That is the fundamental right, is it not?

Indeed, you see, I would argue the remedy of court-ordered busing for purposes of achieving racial balance violates the very right the Court had articulated in *Brown* and elsewhere, the right to racial neutrality in terms of treatment under the Constitution. That would be my first line of argument there, that the right you say exists in fact is not the right; it is another right, and their use of busing undercuts that particular right. Hence, in denying the remedy we are shoring up the right, the right to racial neutrality under the Constitution.

The second line of defense—if the distinguished scholars did not buy that one, they may not buy this one either—I would argue that even demurring, even assuming for purposes of argument that the right is what you say it is, there are many rights that we enjoy under the Constitution but it does not follow that every conceivable remedy that the mind of man might come up with is thereby guaranteed.

I have the right to counsel, for example, but there are limitations on how far the Government must go in insuring that right. I am not entitled to F. Lee Bailey, for example, or Edward Bennett Williams. I can have rights, I am entitled to freedom of speech and press, but it does not mean I am entitled to be funded to own a newspaper.

I do not mean to make light of the point. I am simply testing the premise that having defined "a right" it does not automatically follow that every conceivable remedy that my imagination might think of that would be of utility in bringing about the realization of that right is implicit in the granting of the right. There are limitations.

As you have said, Professor Neuborne, there are other ways by which you can accomplish the right, assuming it is the right to live in a situation where you are entitled to integrated schooling. It might be magnet schools. There are other things that could be done to insure that right, other remedies. I am simply saying, to deny the remedy of court-ordered busing is not necessarily to destroy the whole right. That would be my second line of defense but I am really more enamored of the first—maybe you are enamored of neither—but I am more enamored of my first argument that that in fact is not the right. We are confused on what the right is.

I would contend if that were the right we better look at this very carefully, and the Court better look at it very carefully because if we are saying that race is a factor to consider and can be legitimately employed by State and local government under the equal protection clause of the 14th amendment, that is a very troublesome and mischievous right, I would contend, with two edges to it. In time it will cut in an unjust way as much as it will cut in a just way.

If you could give me your brief responses on that, then I would like to move to my second point.

Professor NEUBORNE. May I, sir?

Senator EAST. Yes, certainly.

Professor NEUBORNE. It seems to me that the right is neither of the two that you spoke of. You suggested that the choice was between an absolute racial neutrality and a right to attend a racially balanced school.

It seems to me that what the Supreme Court has attempted to do is define the right considerably to the center of both of those concepts—the right to be free from the effect of past de jure segregation where past de jure segregation has resulted in a racially segregated school system. A black child who challenges that has the right to be freed from the effects of the past de jure segregation.

What troubles us so much in litigating these cases now, sir, and what perhaps may bring us much closer together than either of us perhaps imagined, is that the real problem is identifying the causation, identifying the extent to which the currently segregated school system is causally related to earlier acts of de jure segregation by the school board.

To the extent that causal link exists, then the remedy is really a remedy designed to undo the effect of past illegal action. I do not think that we would have much of a quarrel about the appropriateness of that remedy.

To the extent the causal link cannot be established, then you have a judge imposing some type of racial balance on a school board which has not itself been guilty of creating the injury. Therefore, as I tried to suggest in my testimony, there are some very sophisticated factfinding determinations that must go on in connection with an order.

Attorneys involved in the area understand the importance of that factfinding. The Supreme Court has made no secret of it. *Dayton II* talked about it. The earlier cases talked about it. That causal link is very, very important. It has to be established. If it is not established, then the busing is inappropriate. It is illegal under current Supreme Court standards and you do not need a statute to tell you that.

Senator EAST. Professor Pollitt?

Professor POLLITT. I agree, Senator East, with the proposition that what we want is a colorblind society where the laws and the Government are colorblind in all their aspects. That is the ultimate that we are all seeking.

The question is, how do you achieve this, and can you use color as a criterion in remedying a denial of our goal of colorblindness? I think that I agree with the Supreme Court in the *Charlotte-Mecklenberg* case where they said that as a remedy to undue purposeful segregative school patterns, Judge McMillan was quite justified in looking at race and looking at quotas and looking at balance and looking at pairing and looking at transportation.

I think that to achieve ultimate colorblindness we must take color into consideration until we have remedied the ills and injustices of the past. However, I think with you that we want to come to that situation where every person—as Dean Harvey so eloquently stated—every person is treated as a person and not as a group or as a class.

Senator EAST. I appreciate both of your responses. In clarifying my own thinking, I think at least, though we may still be somewhat at odds as to precisely what the right is, I think we have focused upon one basic problem we have in this area of what is the right, and then, is this the exclusive or an appropriate remedy to the realization of the right. We will not solve it to all of our satisfactions this morning but I think it focuses upon a key point.

Let me move to my second point and get your responses to it. Then I will return to Senator Baucus. Senator Pollitt, do you—Professor Pollitt. [Laughter.]

Professor POLLITT. I wish.

Senator **East**. We demoted you for a moment there, calling you "Senator."

You used the word, which is always very unsettling to a person like myself, that this was a radical thing we were doing—and I know you meant it in the very generic sense of the word "radical"—in tampering with the jursidiction of the courts, that it goes to the very fundamentals of the separation of power and an independent judiciary and so forth.

Let me attempt to at least fight back a bit on that one and get your response to that, or any other gentleman here. You see, I would argue that under separation of powers, in fact it is the integrity of the independent legislative branch that has been vitally affected here, on the theory that a basic premise of democratic political theory in the American experience is that the legislative body through the deliberative process, which is able to weigh the great complexity of things in terms of fact and value, ought to be the fundamental policymaker. That is probably the basic symbol of democratic political theory.

Now to the extent that major policy decisions of enduring, pervasive social implications are made by courts or made by the bureaucracy under an Executive order or whatever, you erode away at this great fundamental mission and role of the leglislative branch. What we then, I would contend, are trying to do is to reassert or to assert our fundamental policymaking role in a very critical area.

I will put it another way. I cannot conceive of the U.S. Congress, at any time in recent decades or in the near future, or any State legislature in this country, coercing and mandating and forcing and requiring the frequently strained and unbelievable patterns of busing purely for purposes of achieving racial balance that has gone on. It is inconceivable in representative democracy that that kind of tortured result would come about. It could only come about through a society that had become rather comfortable with the idea of elitist dictation, be it court, bureaucratic, or whatever.

Therefore, I do not think what we are proposing is particularly radical at all. We are simply availing ourselves, as I look at the Constitution, of the checks and balances that we have. For example, in this matter of the check and balance upon the judiciary, we have just—if I might quickly tick off the most prominent ones—we have the power of appointment, the confirmation process.

Now frequently we are told we ought not to take that too seriously but I am still one who believes we ought to take it seriously because it probably in the long run is the single best check or balance we have upon the judiciary, the quality of judicial temperament, judicial philosophy of the appointees to the Supreme Court and lower Federal courts.

Second—and I would note the framers gave us this power, now—one might fault the wisdom and prudence of the framers but it is this jurisdictional one under article 3. The appellate jurisdiction of the Supreme Court, the creation of the lower Federal courts, that power is there. Now I do not dispute that you could not argue against the prudence of exercising it. Maybe that is the point you are making: You ought to think very carefully before you exercise that power.

However, I am thoroughly convinced in my own thinking—it does not mean that makes it right or an uncontestable principle—that we have the power under article 3 to do this, to withdraw the jurisdiction. I would say it is a check or balance the framers gave us, that where we needed to, we would be able to check or balance an assertive judiciary.

We have the power of impeachment which we would use most sparingly, of course, but it is interesting to note here the great power we have just for good behavior, which we all know is a very vague thing. It would indicate if we wanted to we could snap back pretty fast because to impeach the executive branch, "crimes, high crimes, and misdemeanors" is required, but to impeach the judiciary, "good behavior" is required. That is a very vague standard and it shows that the framers thought of Congress as first among equals.

We can emasculate the executive branch overnight if we choose to, under the Constitution; we can emasculate the judiciary. I am not saying we should but I am saying we have the power. I would say the Constitution gave Congress the power because again, the legislature is the basic, fundamental institution in representative democratic society—which is the fundamental premise of the American experience. It is the legislative branch that makes fundamental policy decisions about such problems as busing and schools and secondary education, and so forth.

Finally, as to checks and balances, we have the amendment process which I would submit would be a total perversion or could approach that if we end up with a system that works this way. The Supreme Court issues policy edicts and the only way we can overcome them is through the amending process. You see how that enormously distorts the policymaking function of the Congress. All of a sudden, the Supreme Court makes the policy decisions and Congress must share vetoing or overriding that now with a two-thirds vote and three-fourths of the States. Again, I think that would be troublesome to the framers. It was not the purpose of the amendment power.

Finally, as a check or balance on occasion we might be able through statute to change it if the Supreme Court decision invited statutory correction, and finally just through exhortation to restraint which of course is very vague and amorphous and does not have a whole lot of bite in it.

Therefore, basically we have two alternatives to check or balance the judiciary: Confirmation and jurisdiction. I would hope out of these hearings the U.S. Senate and the Judiciary Committee of the United States Senate does not go on record as forfeiting one of the most fundamental checks and balances that has been given to it under the Constitution, namely, the power to withdraw the jurisdiction of the Federal courts.

Now I have talked enough. Let me just ask you two gentlemen—and again, if you will be briefer than I have been but I wanted to elaborate that point—what is so radical about my position on that?

Professor **NEUBORNE**. May I at least have the temerity to suggest why I think it is so radical?

Senator **EAST**. Yes. I am inviting that. Let me down easy, if you will.

Professor **Neuborne**. Senator, you point out and I think quite accurately, one of the basic tenets of democratic political theory is that the legislature makes basic policy judgments. What differentiates our democracy from other democracies in the West that are also perfectly adequate democracies is that we also have provided for a check on the legislature, a very substantial check on the legislature, by providing to a nonmajoritarian branch, the judiciary, the substantial power to determine what the Constitution means in the context of a specific case or controversy.

The power that you are suggesting—and I think you have candidly said it, the power to emasculate the Federal judiciary—is the most radical statement that I have heard come out of Congress in many days. You are suggesting that this committee and that this Congress has the power to turn this country into a European parliamentary democracy where the parliament is supreme. Parliament says what the Constitution means. It keeps the judiciary on a leash. If the judiciary goes too far, Congress announces the judiciary is making policy and simply slaps it down with a jurisdictional provision.

Senator, I do not for a moment suggest that it is the intention of this committee or your intention or anyone's intention to do damage to that institutional structure but it is very fragile, and you are beginning to get very close to the core of it.

Senator **East**. Let me clarify, Professor. I was saying that that was not my position. I believe that it is not prudent for Congress to emasculate the judiciary. I think one ought to go at this with great prudence and caution, which this bill does. It carves out a very narrow place where there has been excessive abuse as I see it.

The point I was making, Professor Neuborne, was not that East said we ought to do that. I am saying it is interesting that the framers, the good James Madisons, gave us the power in the Constitution. If we wanted to press the case, and I do not want to press it, we could emasculate them in the sense that we could render them impotent.

I am saying we ought to forego that but what is interesting—it is probably good Jeffersonian democratic thinking—is that the judiciary would be on notice that the legislative branch has the major, fundamental policymaking role. You will note their conception of judicial review was enormously limited.

Jefferson was opposed to it completely. He said we would be coequal branches in interpreting the Constitution. Unless Jeffersonian views of democracy are radical, he was suggesting co-equality in terms of interpreting the Constitution.

I would note that Hamilton, in the *Federalist Number 78,* which is reflected in *Marbury* v. *Madison,* is a very narrow, restricted conception of judicial power in which Marshall in *Marbury* v. *Madison* and Hamilton in the *Number 78* contend that you would only strike down acts of Congress or a legislative body where they were contrary to the manifest tenor of the Constitution, express provision. He mentions ex post facto laws and bills of attainder.

Therefore, my point would be—this was the point I was making, Professor Neuborne, lest anyone misunderstand where I am coming from—I am saying it is of interest historically that the framers gave this kind of power to the Congress. Hence, when we try to exercise a very small piece of that power in a very limited context, to have thrown up at me that we are doing something very radical I find is rhetorical overkill and would tend, I think, to distort what the framers had in mind and certainly to distort what at least I as one lowly Senator on a subcommittee had in mind.

Dean HARVEY. Senator, may I comment on that, please?

Senator EAST. Yes.

Dean HARVEY. It occurred to me as you were speaking and as my colleagues here were speaking also, that in 1789 when the first Judiciary Act was adopted there was no requirement imposed upon the Congress to create a Federal judiciary inferior to the Supreme Court. If the Congress had not created that judiciary there would not have been, I suggest, a violation of any constitutional provision.

However, once having created it, it was not until 1875, if my memory is correct, that the Congress vested into the inferior Federal judiciary jurisdiction which is alluded to arising under jurisdiction, almost 100 years later. I think those historical observations are important in the context of the proposition or the assertion that if someone were to tamper with the jurisdiction of the Federal District Court, other than the expansion thereof by the Supreme Court, then there would be catastrophic disasters inflicted upon the American public and maybe all of Western civilization.

I think we ought to remind ourselves from time to time that it was the Supreme Court that gave us the *Dred Scott* decision which did have, we must admit, some influence on American history. It was the Supreme Court which utterly eviscerated the privileges and immunities clause of the 14th amendment in the *Slaughter-House* cases, and we have not recaptured that loss to this day. It was the Supreme Court that gave us *Plessy* v. *Ferguson* in 1896, which was the capstone, not the beginning but the capstone of very predominant racial discrimination programs in the United States.

Indeed, only last year it was the Supreme Court that gave us the *Fullilove* decision which was a reaffirmation of *Plessy* v. *Ferguson*. Therefore, I cannot really look upon that distinguished body—although I do love it—with the approach that one must take a view that it shall become untouched forevermore in the annals of American historical development, and particularly insofar as the competency of the Congress is concerned under article 1. I would also urge under section 5 of the 14th amendment, it may define as it chooses to define, and I hope that it does define race and should say, "Get Government out of the race business totally because our history says, when Government is in it, it fouls it up, and that is what has happened."

Senator EAST. Professor Pollitt, maybe you would like to respond. Thank you, Dean Harvey.

You would like to respond, and then I shall say no more and let Professor Baucus—if you will make your comment as concise as you can. [Laughter.]

Senator BAUCUS. I appreciate the promotion.

Senator EAST. We will turn to Senator Baucus.

Professor POLLITT. Well, on the use of the word "radical," Senator, maybe I do not see it as pejorative as you do.

Senator EAST. Well, I am very sensitive. [Laughter.]

Professor POLLITT. But I would say that the bills before us today are quite traditional. They go back to *Marbury* v. *Madison* and the alien and sedition laws. Congress did not like the decisions and they started to impeach the judges. John Marshall suggested that possibly this type of thing could be reviewed in the Senate after the Supreme Court had made the decision. Therefore, the proposal started that long ago and they have been with it since.

This is a tradition of the Congress to explore these problems whenever a judiciary decision was very unpopular. As a matter of policy, Congress has never done it except what the historians call the "radical Republicans" in the immediate post-Civil War. I do not use those terms but——

Senator EAST. I understand that. [Laughter.]

Professor POLLITT. When we did have the *McCardle* and the *Klein* cases. That is the authority, and we differ as to what it means. That is all we have.

As far as the article 3 power to create the Federal courts, Dean Harvey again, I think, stated it well, that there was no obligation to create the Federal courts. Federal jurisdiction was not created until the post-Civil War, 1875. Again, we have the *Portal-to-Portal* cases where the Federal courts of appeals dealt with this problem and there was a lot of persuasive dictum. That is what we have, the pronouncements from the courts to guide us. Other than that, we have our predilections and our own concepts.

I say, I think Congress is mentioned in article 1 and article 1 comes first. I hope that you continue to exercise your powers of appointment. I hope you exercise your powers of impeachment or threatened impeachment—I have an article on that subject—and I hope you continue to jawbone. I hope you do not emasculate the Federal judiciary.

Senator EAST. You were not implying that history is repeating itself with the radical Republicans? I will not make your answer.

Senator Baucus, I have been calling you "Professor." Senator, my apologies. I am having trouble getting people sorted out this morning.

Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Gentlemen, as I hear you, most of you generally feel that race should be treated neutrally in deliberations by both the legislature and the judicial branch. Is that correct? Is that a general statement that you agree with, that Congress should be race-neutral in establishing legislation, and that the courts should be race-neutral in their decisions?

Professor NEUBORNE. That is an ideal toward which we should strive. Yes, Senator.

Senator BAUCUS. I further understand you, Professor Neuborne, too feel that at one point in the history of our country we were not there due to de jure discrimination in our country but it should be public policy to move our country appropriately and with the appropriate sensitivity and speed toward neutrality. Is that correct?

Professor NEUBORNE. Surely, Senator.

Senator BAUCUS. Would you agree with that, Dean Harvey and Professor Dunne, that is, that public policy should encourage our country to move toward racial neutrality?

Dean **Harvey**. Senator, in my judgment the public policy of the United States was established precisely that way in 1868 when race was removed from the categories of ability of Government to function.

I direct your attention to the dissenting opinion of Justice Harlan, the other part of it—it is a very fascinating decision—almost always omitted in public discourse, in *Plessy:* He said that the Constitution was colorblind but he said something else, which was that Government did not have the competency to impose its power otherwise. That would be a denial of superior rights. It is almost always excluded in observations of *Plessy.*

I think that what you just said was true a long time ago, although I think that it has not in fact been accomplished for a variety of historical reasons since the Civil War.

Senator **Baucus**. Professor Dunne?

Professor **Dunne**. Two points, if I may, Senator: The first is, agreeing the ideal is a colorblind society and it should always be our ideal, as Justice Harlan's dissenting opinion in *Plessy* referred to it, there are two difficulties. First of all, you cannot run the time machine backwards. You cannot make a statute today that would have cut off this mischief by the roots in 1875, No. 1, and No. 2, we are still faced with a terrible philosophical problem: Can you achieve good ends by flawed means?

Senator **Baucus**. That goes to my next question. Some would say—and Professor Neuborne is one, in fact, he said it—that the *Swann* case is a case where the Supreme Court said that busing under the circumstances presented was an appropriate remedy to address past or present purposeful de jure discrimination. I take it you disagree with that decision?

Professor **Dunne**. Yes.

Senator **Baucus**. Do you think that is an incorrect decision?

Professor **Dunne**. I would adopt Dean Harvey's point, that it attempts to do communal rather than individual justice.

Senator **Baucus**. It is incorrect because there are other remedies to achieve desegregation, or because we should not as public policy try to implement desegregation? Why do you disagree with *Swann?*

Professor **Dunne**. Well, to turn to Professor Neuborne's point, the court will say, "Self-evidently, busing is the only remedy." The trouble with self-evident remedies is they are evident in no other way. You do not have the pragmatic exhaustion and the testing of cause-and-effect relationships.

Senator **Baucus**. Let's follow Professor Neuborne's idea, that is, that perhaps Congress should set up a hierarchy of remedies, or perhaps attorneys litigating busing cases, should suggest a hierarchy of remedies to a judge. However, what if, after exhausting other remedies, it is the decision of a fair, reasonable-minded judge that the other remedies just do not work? Assuming for the purposes of argument that the only remedy left that will achieve desegregation is busing. Under these circumstances would you still feel it is unconstitutional for the court to utilize that remedy?

Professor **Dunne**. Yes, again, as long as individual rights are violated, that is done.

Senator **Baucus**. Therefore, your feeling is that even if segregation continues—because we have assumed there are no other remedies that were effective—even if segregation continues, the court should agree that segregation should continue?

Dean HARVEY. May I say, Senator, I think that is to win the argument by sweeping all the chessmen off the board.

Senator BAUCUS. We can talk about the other chessmen later.

Dean HARVEY. All right. Let's talk about black and white. I am not willing to assume that segregation will continue if the power of Government is not available to effectuate it.

In answer to your first question, no, I do not subscribe to *Swann* because I think that racial discrimination imposed by the Federal district court is no more noble than racial discrimination when imposed by a school board. That is why I disagree with it.

Senator BAUCUS. However, you are saying that there are other remedies. Is that correct?

Dean HARVEY. Of course.

Senator BAUCUS. OK. Let's talk about those other remedies. What remedies other than busing do you think can achieve racial desegregation effectively?

Dean HARVEY. Whatever it is that the person whose right has been violated chooses to do or exercise.

Senator BAUCUS. Do you have any concrete ideas?

Dean HARVEY. Yes, I do. For example, in the Charlotte-Mecklenberg area, what Judge McMillan did there, if the judge had said to those students who had been discriminated against, "You may go to another school if you wish to go to another school, or you may stay here if you wish to stay here," fine. That would be an exercise of their constitutional rights, once recognized, once the rights are recognized.

Senator BAUCUS. You are talking about implementing some voluntary system.

Dean HARVEY. Yes, that is right, just as I must voluntarily relinquish a known right which belongs to me under the 5th, 4th, or 6th amendments, so also I should have that kind of choice under the 14th.

Senator BAUCUS. What if it were shown—again, just for the purpose of argument—that the so-called voluntary system was in fact not voluntary, and that there was a pattern and practice of students being subtly inhibited or discouraged from voluntarily going to another school. Would that have any bearing on——

Dean HARVEY. Yes, if there is a threat to a constitutional right which a student wants to exercise, that right can be protected and the threat removed.

Senator BAUCUS. Therefore, essentially you are saying that there are other remedies that work—that is your basic point—and that busing as a remedy is incorrect?

Dean HARVEY. Yes, sir; I am saying that.

Senator BAUCUS. Do you agree that this bill is an effort by the Congress to overturn the *Swann* case?

Dean HARVEY. To overturn *Swann*?

Senator BAUCUS. Yes.

Dean *Harvey*. I do not think it would overturn *Swann*. I think it would remove from the Federal district court the power which it now exercises.

Senator **Baucus**. If this bill were to become law, as a practical matter wouldn't it overturn *Swann*?

Dean **Harvey**. It would qualify *Swann* insofar as the busing remedy is concerned, I believe, but overturn it, I do not think it would——

Senator **Baucus**. However, at least it would prevent a court from agreeing that a district court could impose a busing plan.

Dean **Harvey**. I think it would do that, yes.

Senator **Baucus**. I wonder if any of the other members of the panel would comment on whether the practical effect of this would be to overturn *Swann*?

Professor **Pollitt**. I think it would overturn *Swann*, and I think we would go back in time and relive what we went through with some degree of torment.

I would like to comment on the idea of personal justice, so to speak. We had that in North Carolina. We had the so-called Piersall plan, Senator East will recall, in which each school board was to assign each student to that school which was best for that particular student and the community. We had that shortly after *Brown*. I think it came in in the midfifties or the late fifties somewhere.

Under the so-called Piersall plan by 1964, which was the date of the Civil Rights Act when the HEW entered the picture, we had fewer than 100 children in North Carolina attending integrated schools. It just did not work. I can tell you what happened in Chapel Hill and in Durham and in my area, but it did not work, and the only way to make it work was the busing.

The problem about the crosstown busing and so on and the massive busing is the residential patterns are such that there is the Heights High School and there is the lower, Central High School. If you integrate just the Central High School, those people feel resentful that the people in the heights are not integrated, so the simplest way is to integrate the entire system. In many areas that is very simple because of the busing and the rural area situation.

Then what we had was that we bused blacks to white schools, and then there was some resentment, so why not bus the whites to black schools. Therefore, that was the crosstown busing. Judge McMillan put in the ratio so that everybody would have the same achievements, the same benefits, but it would not be localized in a particular area of the school district.

Again, my point is that we did have the Piersall plan which came to my mind as soon as I heard the good dean start to speak about personal rights and personal remedies. We had that. We had that for 7 or 8 years and it did not work.

Senator **Baucus**. Professor Neuborne, do you think that the effect of this bill is to overturn *Swann?*

Professor **Neuborne**. Oh, I think quite clearly. In fact, I think it is candidly aimed at undoing the remedial decisions of the Supreme Court is in this area. I think the basic dispute is with people who disagree with what the Supreme Court has done in authorizing lower courts, when necessary, to go to a busing remedy. Rather than argue the case in the Supreme Court, I think it is an attempt to shift the forum and have Congress impose a legislative solution to what is really a judicial remedial problem.

Senator **Baucus**. In the final analysis should not the Constitution mean what the Supreme Court says it means?

Dean **Harvey**. There was a great Republican President by the name of Lincoln who disagreed with that, and so do I.

Senator **Baucus**. However, as a practical matter, doesn't the Constitution say what the Court says it says?

Dean **Harvey**. On a daily basis, yes, sir; that is correct, sort of. However, the Supreme Court—I disagree with the proposition that our ultimate rights flow from, as one of my colleagues stated, the 14th amendment. I think there are important procedural rights which develop in the due process clause. I think that the rights which we enjoy are protected by the 14th amendment, more or less and from time to time by the judiciary.

I do not think they are created by or flow from the 14th amendment, just as I believe that black persons who were either freedmen or slaves before 1868 had precisely the same rights which I would have enjoyed at that time, were I then living as a white person. I do not think that amendment creates those rights in that sense, in an ultimate sense. Yes, I do speak of ultimate rights which I do think exist and I think were for a while positively protected in positive law but not for a very long time.

Professor **Dunne**. Senator Baucus, may I remind you that a great Democratic President denied that proposition. Specifically, President Andrew Jackson in his veto message of the rechartering of the Second Bank of the United States, he insisted that the opinions of the Court no more bound the Congress than the opinions of the Congress bound the Court.

Senator **Baucus**. Yes. Well, you have an advantage over me. I am not a constitutional law professor, and I am really not familiar with that veto message. However, it seems to me that in our form of government the Supreme Court is final.

Professor Neuborne, you came up with some ideas on how we might approach the whole subject of busing. You suggested constructive ways that Congress might approach this problem rather than trying to eliminate remedies or jurisdiction. I wonder if you could explain your ideas more fully.

Professor **Neuborne**. Very briefly, sir, because I realize that time is a problem, one obvious problem that I think anybody litigating in this area would immediately identify, that is the causation problem that Senator East referred to and that the Supreme Court has referred to on a number of occasions.

The only way that you can really come to grips with exactly what the right is that is being protected in these proceedings is to have a sensitive factfinding process in which the evil that the court is remedying is specifically identified. What are the de jure segregative acts which give rise to the violation of the Constitution? What are the causal links between those de jure segregative acts and the current state of public school segregation in the area?

Now there is nothing magic about that kind of factfinding. There will be disputes. There will be difficulties in deciding what kind of evidence is relevant, who has the burden of proof, precisely what kind of hearing must go on.

It seems to me that it would be extremely helpful, both to the lower court judges—who by the way are not looking for problems. They do not run around trying to create social problems. They have these cases thrust upon them and are doing the best they can. The lower Federal judiciary, I suspect, would embrace a systematic and careful set of directions from the Congress, explaining to them what their factfinding responsibilities are before they issue a busing order.

One of those factfinding responsibilities is clearly to delineate the causal link that exists between the de jure segregative act and the current state of public school segregation that they find before them. Other issues that I think are relevant are issues going, for example, to the potential safety of the children who are engaged in the busing.

I have two children. The very first thing I would think of in a busing order is the safety of my children. I would want that issue seriously considered by a Federal judge. I would want Congress to tell that Federal judge that he had better hold factfinding determinations on that and make findings of fact before the issues go forward.

The educational viability of the schools to which the students are being bused, the relationship between the school that they are being bused to and the school that they would have attended otherwise—that is a relevant consideration for a parent to care about. I think the judge should be required to make factual findings on that point before ordering a busing decree.

Third parties interested in the event—the parents of the children who are going to be bused, to put it bluntly—are often outsiders who do not participate in the process, either because they cannot afford a lawyer or because the process has gone on so long that intervention is no longer possible at the remedial phase. It seems to me that it would be perfectly appropriate for Congress to require in some way that a hearing be given to those people before the busing order goes into effect and that they be permitted to bring forward the objections to the busing order that perhaps are not getting to the judge's ears otherwise.

The possibility of alternative remedies—it seems to me that a judge should be required, if Congress thinks it appropriate, to exhaust all the alternative remedies which Senator East has suggested. The notion of magnet schools—my daughter attends a magnet school in Brooklyn to which she travels 1 hour by public transportation, and it is, I assure you, a very substantial inconvenience for her to go there. The school is so good that we are willing to undergo that inconvenience to have her go there. Those kinds of remedies are also possible.

A judge has only two remedies: He has a compensatory damage remedy and he has an injunctive remedy. Those are the only traditional remedial devices available to a Federal judge. Congress, on the other hand, has the power, if you wish, to create innovative remedies. It may cost some money; I do not suggest that it does not. It is possible perhaps to structure educational environments in which people will voluntarily move into integrated settings but without busing, and it seems to me that that is something that you might want to consider as well.

Hearings on the alternate remedies available in school desegregation cases, it seems to me, would be a much more constructive way of going about this than hearings on an attempt to take away the only remedy that many judges now think is available. Maybe what we need is some education of the judges as to what the alternative remedies are and what remedies Congress wants them to try before they go to a busing order.

Senator BAUCUS. I think that is a good idea. Nobody likes busing. As a final remedy, it may be necessary, but it seems to me that we in the Congress would be performing a more valuable public service by doing just what you suggest, that is by holding hearings on alternate remedies. In that way we could offer the courts some guidance. In my view that would be a more constructive approach. I thank you.

Senator EAST. Gentlemen, we thank you very much.

[The prepared statements of Professors Harvey, Dunne, Neuborne, and Polliitt, with additional submissions, follow:]

PROF. WILLIAM F. HARVEY

An Introductory Summary of the Conclusions, Suggestions and Recommendations on the "Neighborhood School Transportation Relief Act of 1981"

Conclusions:

I. The Congress, under Section 5 of the Fourteenth Amendment, has a positive responsibility to give statutory definition to the words "person" and "equal" in the Equal Protection Clause of the Amendment.

II. The Congress has a positive responsibility to define the words "person" and "equal" in the Fourteenth Amendment as they were used and developed in the Declaration of Independence, by Mr. Lincoln in his debates with Senator Douglas, and by Congressmen Bingham and Lawrence, among others, between 1866 and 1868, in their development of the Fourteenth Amendment.

III. Rights which are secured by the Equal Protection Clause of the Fourteenth Amendment are individual and personal rights which belong to person(s). Persons hold those rights independent of any and all identifiable classes of persons.

IV. The Supreme Court of the United States has displaced rights of persons and individuals under the Fourteenth Amendment. The rights of persons were displaced in the cases of Board of Regents v. Bakke, 438 U.S. 265 (1978), in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), in Fullilove v. Klutznick, 448 U.S. 448 (1980), and in Green v. County School Board, 391 U.S. 430 (1968).

V. In displacing the rights of persons under the Fourteenth Amendment, the Supreme Court of the United States has struck at the very foundation of the Republic, which is the Equality found in the Declaration of Independence. It has embraced the political philosophy of Senator Stephen A. Douglas of the 1850s, reinforced by interpretations of social statistics; it has rejected the political philosophy of Abraham Lincoln of the 1850s and the 1860s, and the meaning of the Fourteenth Amendment's Equal Protection Clause.

VI. School Busing Programs under Federal Judicial Decree derive from the political philosophy identified in the Supreme

Court cases referred to above. That political philosophy may be referred to as the "Stepehn A. Douglas Philosophy" or interpretation of the Fourteenth Amendment.

VII. School Busing Programs under Federal Judicial Decree deny Constitutional rights under the Fourteenth Amendment's Equal Protection Clause. It is the case today that the "remedy has become the wrong", and the greatest perpetrator of the "judicial wrong" which denies Fourteenth Amendment rights under its Equal Protection Clause is the United States District Court System, compelled as it is by Federal Appellate Courts.

VIII. The first duty of the Congress is to correct the interpretations of the Fourteenth Amendment using the plenary power which it has under Section 5 of that Amendment.

IX. The Bill now pending before this Committee is directed at curtailing the denial of Constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. That denial of rights occurs in the massive, class action "remedies" programs imposed by United States District Courts.

Suggestions:

I. In its present form the Bill probably will be disregarded by the United States Supreme Court as either (a) trenching on its notions of Constitutional rights or (b) that it is inapplicable to school desegregation cases because those federal district court decrees "enforce Constitutional rights", so to speak, which is their purpose, so they say, and hence this Bill is simply inapplicable to that area.

II. A Court which can engage in the kind of intellectual legerdemain which is found in decisions such as Green, Bakke, Weber and Fullilove, will pay little attention to this Bill. This Committee should carefully note the concurring opinion by Mr. Justice Powell in Fullilove, Part IV, A, of the Justice's opinion. There he writes about the power of the Congress to interpret the Fourteenth Amendment--IF that authority is exercised in a "manner that does not erode the guarantees of these Amendments."

Regardless of the fact that that comes from a man who has himself engaged in a massive erosion of the guarantees of the Fourteenth Amendment, it must be taken to heart when writing a Bill which is designed to enforce those rights. The problem, it seems, with Mr. Justice Powell is that he can be righteous "in His name sake" but the Justice seems unable to define "His" in this context. In other words, the ultimate standard(s) by which the American Republic was formed cannot be disposed of by the most recent notion of a majority on the Supreme Court.

Recommendations:

I. That the Congress and this Committee find that the use of racial criteria for any purpose is not permitted under the Fourteenth Amendment's Equal Protection Clause.

A. Please see in this regard the opinion of Mr. Justice Steward and Mr. Justice Rehnquist in *Fullilove*, supra.

B. Please see, too, the opinion of Mr. Justice Murphy in *Korematsu v. United States*, 323 U.S. 214, 242 (1944).

C. Please note carefully the remarks of Congressman Bingham in 1866 on the Fourteenth Amendment: on February 28, 1866, 39th Cong. 1st Sess, page 1088 of the *Cong. Globe*, and again on March 9, 1866, page 1292 of the *Cong. Globe*.

D. Please see the comments of Congressman Lawrence on the Civil Rights Bill of 1866, 39th Cong. 1st Sess, page 1832 of the *Cong. Globe*.

II. That the Congress and this Committee find that the use of a class remedy in class actions under F.R.C.P. 23 is not permitted as a means to enforce rights under the Equal Protection Clause of the Fourteenth Amendment, for the reason that such a remedy violates that very Amendment which protects the rights of a person. The Fourteenth Amendment does not refer to a class of things, persons, or objects.

III. That the Congress find that the United States District Court System, compelled as it is by Federal Appellate Courts, has engaged in the displacement of personal, Constitutional rights, by arrogating unto itself (in the form of judicial decree) those rights which belong to persons, namely children attending schools.

A. A finding that a state agency of some sort (i.e. a school board) has engaged in unconstitutional conduct and denied personal rights under the Fourteenth Amendment is not a kind of "writ of transfer" to the Federal District Court itself.

B. The right which has been denied is not protected by its continued denial. The judicial remedy has become the legal wrong.

IV. That the Congress and this Committee find that only the person who has had his right denied can invoke a remedy of his choice. That is, in the context of a school system, only a person can decide whether to continue as that person is now, or to make a different decision, i.e. to attend some other available school.

A. If we may say that in areas of stated rights, such as in the Fourth, and Fifth and Sixth Amendments to the Constitution of the United States, that there is no loss of those rights unless "there is a voluntary relinquishment of a known right," then we may also say that under the Fourteenth Amendment, no governmental person (a federal or state judge) can enter any decree which affects [my] Constitutional right without my express and personal consent.

B. Federal Bankruptcy courts, every day, engage in a greater consideration of small assets and things, than federal courts today give to individual school children.

C. This approach will, of course, enrage the "desegregation industry" which consists of attorneys and social psychologists, lower school and university administrators who maintain "fronts" in the form of school or departments which depend on governmentally-sponsored racial programs, judges and federal judges especially who fully enjoy their sensations of "power" over a community of children (when it is accompanied by a language structure which permits them to believe that they do well for all, or for a majority), of other school experts, committees, subcommittees and endless study and social groups, all of which (except the judges) received millions and millions of court-ordered dollars.

It is sufficient to observe here that the "desegregation industry" does not support or protect Constitutional rights; it does not, as Prof. Thomas Sowell might say, increase the number of available transactions which two or more can engage in. It destroys those transactional opportunities which alone create genuine advantages and returns for identifiable minority persons and groups of persons.

PREPARED STATEMENT OF PROF. WILLIAM F. HARVEY

Thank you for your invitation to appear and testify before the Committee today, concerning a Bill which may be cited as the "Neighborhood School Transportation Relief Act of 1981." I deeply appreciate the recognition which the Committee has given to me in extending this invitation to be here this morning.

This Bill stands at the intersection of two very substantial currents of thought in American social life and history, and particularly American legal history. The Bill represents also an effort to address the principal form of denial of Constitutional rights which is occuring today in these United States. The Bill speaks specifically to certain findings by the Congress and it addresses federal judicial competency in the so-called "remedies" side of School-Desegregation Litigation. My purpose in this written statement is to address those areas.

I. A Conflict of Constitutional and Social Doctrine

The fact that this Bill has been introduced is of itself evidence of the continuing conflict which has occurred in our social and constitutional history. It is a conflict which goes to the very center, the foundation of the American Republic. It has to do with the concept of Equality. Today that concept is fractured. It has been judicially fractured, although very clearly a definite philosophy of Equality (to which I subscribe) was established both in the Declaration of Independence and in the Constitution of the United States in 1868 in the first section of the Fourteenth Amendment in the Equal Protection Clause.

The Equality found in the Declaration and in the Fourteenth Amendment in 1868, as explained best by Mr. Lincoln, is the Equality of man in his natural rights, to which all else, and particularly the functions of government whether a majority vote in a Legislature or Judicial review in a Court, is both subordinate and derivative. No government, no state, and no court can deny those equal natural rights of man and remain, at the same time, legitimate.

It was this understanding of Equality which alone destroyed the institution of slavery in the United States. It is this understanding which is the "sheet anchor" of our Republic, and of Mr. Lincoln's philosophy.

There is a concept of Equality which is radically different, however, and it is now embraced by the Supreme Court of the United States, and the Court holds that it informs the Fourteenth Amendment. The concept of Equality which is radically different than the Equality which was established in the Equal Protection Clause of the Fourteenth Amendment in 1868, does, in fact, subordinate Equality to several other propositions: Equality among persons and in the nature of men is subordinate to the doctrine of popular sovereignty (as manifested in the halls of the legislature) and in the selection of representatives to a legislature. This doctrine holds that it is perfectly proper for a legislature and the representatives of a group of persons known as voters to deny Equality among persons entirely by the legislative fiat. Or, if not total denial then, at best, it doesn't really matter how a legislature votes on a bill as long as there is a majority voting in the legislature which represents a majority of certain persons among voters. It is then permissible to take any stance the legislature, through its congressional enactments or state-legislative enactments, decides to take.

A second proposition to which the philosophy of Equality among men is subordinated is that Equality can be defined for this moment and for this day, whatever the moment or day happens to be, by court decree and by judicial declaration. This proposition holds that Equality today might mean an allocation of public resources upon a basis from which all persons of an identifiable race are excluded from participation (in the allocation) is perfectly legitimate; or tomorrow this form of judicially delcared Equality might say that the allocation of public resources on a basis in which 20% of an identifiable race shall receive 20% of the allocation is perfectly legitimate; or on another day this concept of judicially-decreed Equality might mean that there shall be a complete and total separation of persons by race among all public and, if necessary, private institutions in the society; or this notion of Equality might mean that there is no redress, and especially not in the judiciary, when there has been a total usurpation of all personal rights which occurs for the greater good of state power.

Dividing these two concepts of Equality among men is a challenge, because today the historical materials which identify each of these propositions are rather abundant.

The concept of Equality to which I subscribe, and because of that concept I support this Bill as an initial measure (which I'll explain in a moment), was established in the Declaration of Independence. It was articulated better by

Mr. Lincoln in the Nineteenth Century than any person before him, or any person since that time. It was plainly established by Congressman Bingham in the first section of the Fourteenth Amendment. This is an understanding of Equality which has been beautifully defined by Professor Harry V. Jaffa, and I credit him among others, with my understanding and interpretation of Mr. Lincoln's philosophy.

Mr. Lincoln said to us, particularly in the Lincoln-Douglas debates, that the subjugation of other individuals by race, or slavery in general, was not compatible with the nature of a republican government. It was not possible to permit citizens to vote to establish slavery in the territories because that would itself repudiate the principle of Equality which has defined the nature of the American government. In Mr. Lincoln's view the removal of slavery was required because of the principle of Equality of all men. That principle itself defines republican government, and Mr. Lincoln taught that that principle creates all subsidiary functions of republican government, whether it is the derivative called "popular sovereignty," or whether it is a lesser function called "judicial review" and the equity powers of a court of limited jurisdiction which is the federal judiciary. In Mr. Lincoln's principle of Equality he asserted the propositions which are found in the Declaration of Independence and which did embrace, or course, the American Negro or the American Black, although that person was not uniformally treated in the initial development of the Constitution itself.

It thus is plain that Mr. Lincoln's understanding of Equality is not a proposition which can be either denied by empirical data or supported by empirical data; it is not a proposition which is influenced by any evidence of today's social science or political science; it is not a proposition which, indeed, any government is able to legitimately deny. If it does, then that government or that organization of state power cannot manifest itself or represent itself as one representing anything other than the organization of power. It followed from this that those temporary obstacles which appeared to thwart the fulfillment of the promise of Equality did not detract, in Mr. Lincoln's interpreation, from the validity of the promise or the certainty of it itself.

Mr. Lincoln's fundamental proposition was that no man was good enough in a moral sense to govern another without that other person's consent, and if that person was held incapable of giving his consent then the first individual could not enter into an act of government toward him or over him. He said in Ottawa, Illinois on August 21, 1858, that there was no reason in the world why the Negro was not entitled to all the natural rights enumerated in the Declaration of Independence. I emphasize here the words "natural rights" because there was no greater spokesman for that philosophy than Mr. Lincoln.

I allude to his comments in July of 1858 in Chicago when he spoke about decendents of other men and women who had come from Europe: Germans, Irish, French and Scandanavian persons who, he said, did not share the ethnic heritage of those persons who wrote the Declaration of Independence. But it did not matter to them, as it did not matter to Mr. Lincoln, because those persons could themselves be a part of that great heritage established in the Declaration of Independence which said that "we hold these truths to be self-evidence, that all men are created equal." Mr. Lincoln then went on to state that those Germans and Irish and French and others:

> "could feel that that moral sentiment taught in that day evidences the relation to those men, that it is

> the father of all moral principle in them and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration, and so they are. That is the electric cord in that Declaration that links the hearts of patriotic and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world."

Professor Jaffa has taught that the last address in the great Lincoln-Douglas debate was, of course, Lincoln's Gettysburg Address which was delivered after the Battle at Gettysburg and some three years after the death of Stephen A. Douglas.

Mr. Douglas represented a different concept of Equality, a different form of Equality, and a different practice of Equality. In fact, the views of Stephen A. Douglas were not the views of the Equality of men at all. Senator Douglas did not declare for the principle of slavery as such. What Senator Douglas did declare was that it was entirely within the competency of a people acting pursuant to the doctrine of public sovereignty to determine whether slavery would continue to exist or not continue to exist. He could never admit that a people acting through their elected representatives, or perhaps even in a townhall assembly, could be denied the right to decide whether they wanted slavery by the imposition of that status upon others. For Senator Douglas, as for many persons today and the Unites States Supreme Court, the doctrine of "popular sovereignty" was not subordinate to any other. Clearly it was not subordinate to any moral sentiment or moral proposition of Equality. If one wanted to establish a different order of things then what one had to do was acquire power. A majority of votes was required in the legislature, or in that body of government which was brokering power. Mr. Lincoln, on the other hand, said that the principle of Equality was higher, much higher, than the function of popular sovereignty. He held to the principle that Equality was higher than any other. It is that principle which defines the republican form of government, and no principle of popular sovereignty, or the subordinate underlying principle of judicial review, is superior to that moral concept of Equality.

It was not that Equality was merely an understanding or a functioning relationship among certain persons, or of no greater standing than any other relationship. It was that Mr. Lincoln's concept of Equality was, as he called it, the "sheet anchor" of the Constitution, and of republican form of government.

We identify Mr. Lincoln's concept of Equality, and particularly his understanding that it could not be defeated, or added to, by some form of evidence of superiority or of degradation. We compare that understanding to the opinion of Mr. Justice Blackmun, for example in the Bakke decision, 438 U.S. 265, 406-407 (1978). This Justice informs us that governmental preference is no stranger to our life. We see it in many different programs and we permit some of these on the ground that they have specific Constitutional protection. Admissions to educational institutions have always been selective, we are told, depending upon athletic ability, anticipated financial largess, and alumni pressure. Equality in the administration of a governmental university program is really no different than that form of selection and preference, and then we observe his conclusion:

"in order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently--we dare not--let the equal protection clause perpetuate racial supremacy."

We ask, what is the source of such commentary? The source we can identify very quickly as being lodged in the proposition of the supremacy of Popular Sovereignty, and of course, the supremacy of a derivative of popular sovereignty, which is Judicial Review. There is a direct line between the doctrines espoused by Mr. Justice Blackmun, or Mr. Justice Brennan, and the doctrines which were articulated by Senator Stephen A. Douglas before the Civil War commenced.

For myself, of course, I cannot subscribe to such empirical-type notions that Equality, as the first and topmost principle of social organization and thus government, is somehow similar to, if not identical with, "alumni pressure" or "athletic ability" or "anticipated financial largess" in the administration of a public institution. Just as I did not agree with that when I wrote an amicus brief on behalf of Mr. Bakke in that case, I do not agree with it now. I shall never agree to it.

Accordingly, if one seeks a parallel to my views about Equality, perhaps in contemporary form, then one can, generally speaking, examine the amicus brief of the Committee of Law Teachers Against Segregation in Legal Education, which was filed in 1950 in the case of Sweatt v. Painter, 339 U.S. 629 (1950). That brief said, in part, that laws which give equal protection are those which make no distinction based on race, in the sense that they make no distinction because of race. The brief sided with Mr. Justic Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896). The "Law Teacher's Brief" in Sweatt v. Painter was sadly lacking in research and scholarship which was not supplied by the prominence of the names attached to it. However, its result, in essence, to which I agree, would have ruled out all racial preference and distinction in the administration of all statutory law, and I insist that in this context there is no distinction between "government" or "state activity" and a court, whether federal or state.

Accordingly, I am happy to separate myself from the position of the Association of American Law Schools, or of the American Bar Association, as shown in each amicus brief in Bakke, and their conduct on other occasions since Bakke. Those two organizations and American unviersities in general have no greater ability to administer their racial criteria than a club-swinging sheriff in Selma, Alabama. There is no justification of any kind, in statements which are issued, from time to time, by college presidents (or the attitudes they represent), about student-body racial diversity, which statements find their way into Supreme Court opinions.

Law cannot make a distinction based on race, or on "a rational basis of race" or on an "imperative need of race." Mr. Lincoln taught that in the 1850s. It was correct then, it was correct in 1950 when it was vaguely understood in the A.A.L.S.; it is correct today and I fully subscribe to it.

I remind this Committee that, as the Supreme Court said in Erie Railroad v. Tompkins, 304 U.S. 64 (1938), regardless of the judicial gloss covering a Constitutional mistake, it is still required that that mistake be corrected. So also here!

It is easily suggested, as Mr. Justice Brennan informed us in his opinion in the Bakke case, 438 U.S. 265, 326, that although our nation was founded upon the principle that all men are created equal, we must, Justice Brennan declares, recognize that the framers of our Constitution openly compromised that principle with its antithesis: slavery. He tells us that the consequence of this compromise is well known and is called our "American Dilemma". From this he suggests that the forms of racial discrimination which flowered so intensely in the Twentieth Century, and particularly in the first 30 years of the Twentieth Century, come to us from the status of slavery itself. If this is the reading which Justice Brennan gives to our history, I suggest to the Committee that that reading is totally in error. That is one of the greatest historical mistakes we make. It is to assume that racial discrimination developed naturally from the status of slavery which was ended with the Civil War. That is not so! Racial discrimination came to us in a program of development which employed the use of state power under a governmental qua power doctrine sanctioned by the Supreme Court commencing with the Slaughter-House cases in 1873.[1] The case of Plessy v. Ferguson, for example, was an inevitable product of the Slaughter-House cases. It is not that Plessy v. Ferguson and racial discrimination, as practiced in the United States, developed naturally from the status of slavery. Racial discrimination came to us because of Judicial construction which was extended to the Fourteenth Amendment especially by the Supreme Court of the United States. If that were understood, generally, then the origins of the "American Dilemma" could be correctly identified and the "Dilemma" rather quickly remedied.

II. The Remedy is the Wrong in School Desegregation Cases

Today school desegregation litigation has become bizarre and so constitutionally contorted that there is a kind of unwritten assumption that when a school board or other public authority has been found to have engaged in discrimination

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1. 83 U.S. 36 (1873).

which was an invasion of the person's right under the Fourteenth Amendment, then, in some way, that person's right is transferred to a kind of possessory interest or power of the United States District Court system. It is used in any way which the United States District Court wants to fashion. There is truly no legitimacy today, in the judicial remedy side of desegregation litigation. Desegregation litigation today results in the wholesale denial of Constitutional rights rather than the protection and enforcement of constitutional rights under the Fourteenth Amendment.

I suggest to the Committee that a principal reason that this legislation is needed is that today the judicial remedy has become a wrong. I suggest that the origin of the most recent chapter in the "American Dilemma" is found in a denial of meaning to the word "person" in the Equal Protection Clause of the Fourteenth Amendment. The principal reason that the remedy has become the wrong is that, if the Equal Protection Clause were given vitality by the Supreme Court and the federal judiciary in general, than it would understand that there is no class remedy available, not even in class actions, for the protection of a "person's" Constitutional right which is recognized under the Fourteenth Amendment.

A recent obstruction to clear understanding occurred with certain amendments to the Federal Rules of Civil Procedure in 1966, and in particular Federal Rule 23 providing, as it does, for class actions in civil rights cases and in school desegregation litigation. One can agree with the proposition that a determination of class liability is available to a class of persons, but it does not follow from this (and here I think a major constitutional blunder has developed) that a class remedy is available simply because a court finding of class liability has occurred.

I suggest to the Committee that the class remedies such as massive busing programs which are used by the federal district courts, which have been sanctioned, as we all know, by the Supreme Court of the United States, see for example Board of Education v. Swan, 402 U.S. 43 (1971), are themselves a denial of the very language and meaning of the Fourteenth Amendment. That amendment is designed to guarantee personal, individual rights. It speaks about individuals and it uses the word "person". The Fourteenth Amendment does not refer to "class rights," and it was not designed to permit a class remedy. The Fourteenth Amendment's Equal Protection Clause speaks about personal rights, see Shelley v. Kraemer, 344 U.S. 1-22 (1948), Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938), and McCabe v. Atchison, T. & S.F. R. Co., 235 U.S. 151, 161-162 (1914), and of course Mr. Justice Powell's opinion in Bakke, 438 U.S. 265, 289 (1978), among other authorities. The word "person" was not inserted in the Fourteenth Amendment by accident; it had a very special meaning, and it has that meaning today.

III. Race Is Not An Acceptable Criteria

I do, of course, recommend to the Congress that the Congress interpret the Fourteenth Amendment to bar use of race in all instances of governmental function and activity. (This is the principal meaning today of the Equal Protection Clause, particularly after the Supreme Court eviserated the privileges and immunities clause in the Slaughter-House Cases). It follows from this that race is not an acceptable criterion for any governmental activity, including the judicial activity. The judicial function is no less a form and function of government than a school board which has practiced racial discrimination. It is all a function of government and there is and can never be a distinction based upon the notion that "benign" racial preference is acceptable, or that we must "discriminate against discrimination", or that if our intention is "good", or if our intention is "creative", or if our intention is "to do both well and good in a racial sense", then it is permissable to engage in racial discrimination on a wholesale basis.

Mr. Lincoln said that no legislature has that capacity, and I state that the courts have shown themselves to be no more competent than the legislature, the "popular sovereign." When it is asserted and validated as it was in the Fullilove, Weber, Bakke, and Green, it is a repudiation of the fundamental doctrine of Equality which is the fountainhead of this Republic. I hold that race is not an acceptable criteria or standard in any governmental function whether it is admission to a school of higher education or admission to a secondary school, and whether it is being performed by a court or by a school board or by the president, or some committee of a university.

Our history teaches us that we will not know racial harmony in the United States until government gets out of the "race business." Government has been in the "race business" in one form or another since the SlaughterHouse decisions of 1873 (which were not interpretations based upon a racial activity) and it has never ceased from that activity. I think the great benefit this Congress can serve is to remove government from that activity and the place to commence is to support and interpret the word "person" as it is found in the Equal Protection Clause.

I hope that the Congress, after this Committee, will bar race as criteria in all governmental activity and function. That is what the Congress intended in the Privileges and Immunities Clause, thence the Equal Protection Clause, in 1866-68,

IV. The Congress and Section 5 of the Fourteenth Amendment

I take it that there is no serious question about the power of the Congress to act under Section 5, and perhaps Mr. Justice Powell will recognize, as he indicated in Fullilove, that the Congress clearly can act when it protects Constitutional rights under the Equal Protection Clause. Moreover, it clearly can act when those rights have been denied by federal court orders which are supported by federal appellate courts!

It is my judgment that the Congress should act under Section 5 of the Fourteenth Amendment by reinforcing the dignity of the individual, and by interpreting, if necessary, the word "person" in the Equal Protection Clause. I would hope that the Congress might develop a remedy program for discrimination which occurs under the Fourteenth Amendment. That remedy program must be tailored to individuals, and if properly developed it will mean that there is no class remedy available in Constitutional, desegregation litigation.

Always in Constitutional, desegregation litigation, we speak about personal rights. We speak about individuals, who seem to form a class in the minds of class action plaintiffs because they have an identifiable color. However that may be, the remedy which is available must be an individual remedy and only an individual remedy.

In the Bill's present form, however, I think that the Supreme Court and inferior federal courts will continue to invoke the judicial power they now assert and, essentially, disregard it. They would hold that busing orders are not for the purpose of altering either the racial or ethnic composition of a student body (see page 3, lines 16 and 17, 21 & 22), and that the Bill is inapplicable to a Constitutional "remedy" they would develop, or, under Justice Powell's notions, set out in Fullilove, it is unconstitutional.

I think that any court which has the ability to write as the Supreme Court wrote in the majority opinions in Fullilove, Weber, Green, and the Powell-Brennan opinions in Bakke, would pay slight attention to this Bill in its present form.

It follows that I support this Bill, given the specific Conclusions, Suggestions and Recommendations which are set out at the commencement of this written discussion.

Conclusion

On the longer pull, I would hope that the Congress, perhaps with the support of President Reagan's Department of Justice, even if it is too much to expect from the American Bar Association and the Association of American Law Schools, will statutorily redefine the protection of our rights under the Equal Protection Clause of the Fourteenth Amendment and (a) bar the use of race for and in all criteria and usage in all governmental function and (b) thereby withdraw government and particularly its court system from the horrible business of racial manipulation.

If this Committee should proceed in that way, I stand ready to assist it as it deems appropriate.

PREPARED STATEMENT OF PROF. GERALD T. DUNNE

I am honored to appear before this subcommittee, a sensibility that is tempered by the bewilderment of why United States Senators should listen to academics on issues of high public policy. As Professor John Hart Ely has put it: ". . . a Governor Warren or a Senator Black will rightly see no reason to defer to law professors; even less do they need Academy's advice on what is politically feasible."[1]

And on the nuclear issue before this group - judicial assignment of children to schools on the basis of race and color - perhaps the subcommittee should be listening to my wife who has overseen, surpassingly well, the education of six children on a trail which runs from pre-kindergarten through medical and law school. She should, therefore, be the expert witness. However, having devoted a number of years to studying the lives and reading the mail of some great American jurists, perhaps I might hazard a guess as to what Joseph Story and Hugo Black might say were they sitting in this chair this morning.

Hence, to begin at the beginning - a generation ago Herbert Agar reminded us that the constitutional disputations of the meredian New Deal, whether presidential ascendancy, rubber stamp congress or pliant judiciary, were essentially confrontations over specifics and not generalities, and now as then analysis of the constitutional issue must begin with appraisal of the controversy for which constitutional exergesis is but reflection and overlay.

And on that point here, I must cite Martin Mayer, surely our most perceptive cultural historian and astute social critic:

> To force parents to send children to a school they consider less good than the one previously available is

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[1] Ely, "On the Wages of Crying Wolf," 1 Human Life Review 44, 59 (1975).

> a decision fraught with major negative consequences. We are, I fear, going to pay a terrible price for having placed on our young people the entire burden of socializing the rural Negro come to the city. But the worst of it has been the rebuke to the best instincts of the family and to the desire to look to the future, which is always closely linked to children.[2]

More than this, these disasters by decree, as Professor Garglia has well called them, are the grossest violations not only of the very Constitution they purport to enforce, but of the cases construing the precise point involved and which range from Pierce v. Society of Sisters to Brown v. Board.

Assuming that the assingment of children at wholesale to distant, hostile and dangerous environments is utterly without warrant in the constitutional text of the values encapsulated therein, we come to the other question: What then is to be done? The answer to that question is found in the constitutional text and is consonant with its design and consistent with its values, specifically the last sentence of the second paragraph of Section 2 of Article III. Here the obvious grant of congressional control over federal jurisdiction provides an instrument that is nicely crafted to the job at hand.

Without necessarily reopening the debate over the origins of Article III, it is surely not amiss to point out that both the "ordain and establish" predicate and the "exceptions and regulations" qualifier constitute the sole checkrein, short of constitutional amendment, over men - not angels - who are appointed for life and are accountable to nobody. In sum, the only permissible inference is that it was crafted as such.

To be sure, the checkrein has been infrequently used, but when used it has been judicially validated.[3] This process of judicial acquiesence involves a constitutional perception that is fundamental and one inferable from the positions of both Hugo Black and Joseph Story. And I say this notwithstanding the vitual cachet of Justice Story as an insistence that Congress is constitutionally required to create an apparatus of lower federal courts and vest the entire range of federal jurisdiction in them. Two circumstances blunt the grandiose inferences. First, this simply never has been and it may be hazarded never will be. Second, that when the chips were down, Story conceded that the Constitution gave no jurisdiction ex proprio vigore, and that statutory intermediation, supplied by Congress, was indispensable to whatever they did have.[4]

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[2] Mayer, Today and Tomorrow in America, p. 211. (Paperback 1975)

A century and a half later, the juridical thought of Hugo Black comes out to the same bottom line. On the exegetic overlay, there is his clarion declaration: The Founders of this nation entrusted the law-making power to Congress alone in good times and bad . . ."[5] And on the nuclear controversy, there is his comment during oral argument on forced busing as an effort "to change the arrangement of people's lives all over this nation."[6] Again, there was an action when the chips were down, his affirmative vote for the Norris-LaGuardia Act and his perfuntionay participation - one procedural question - of the statute which stripped the federal courts - all federal courts - of jurisdiction over injunctive remedies in labor disputes.

Norris-LaGuardia is something of a key here, and standing for the proposition that when an ideologized judiciary, in Hamilton's

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3. Stuart v. Laird, 1 Cranch 299 (1802); Sheldon v. Sill, 8 Howard 441 (1850); Ex Parte McCardle, 7 Wallace 506 (1869); Lauf v. E. G. Shimmer Co., 303 U.S. 323 (1938); Lockerty v. Phillips, 319 U.S. 187 (1943); see also Taylor v. St. Vincent's Hospital, 369 F. Supp. 948 (D. Mont 1973).

4. White v. Fenner, 29 Fed. Cas. 1015 (No. 17,547) C.C.D.R.I. 1818).

5. Youngstown Tube v. Sawyer, 343 U.S. at 589 (1952).

6. The New York Times, February 28, 1971.

phrase, forsakes judgment for will, a salutary congressional intervention is in order to right the constitutional balance. Indeed, if a historian could program the course of this bill, he might well chart its course to arrive at the presidential desk on March 25, 1982, which will be the golden anniversary of Herbert Hoover's approval of the earlier statute and a felicitous precedent for this one.

But to return to the present. Justice Black's insistence on the plain meaning of plain words ("I read 'no law abridging' to mean no law abridging.")[7] is a salutary safeguard against ideological extrapolations to twist the obvious and straightforward content of Article III.[8]

In addition, those well-meaning glosses also unite in asserting a sort of disaster potential in congressional use of conceded and obvious powers. To be sure, as Senator Moynihan noted, the American constitutional design is characterized by tension and counterweight capable of subverting it. To be sure, misuse of the appointment power can effectively destroy judicial independence. So can simple failure to appropriate. And overuse of the jurisdictional authority can produce the same effect. None of these is the case here, and the medicine of the Constitution need not become its daily bread. As Justice Frankfurter well noted:

> The process of constitutional adjudication does not thrive on conjuring horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency.[9]

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[7] Jacobellis v. Ohio, 361 U.S. at 157 (1954).

[8] See, e.g., Hart, "Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic," 66 Harvard L. Rev. 1362 (1953); Ratner, "Congressional Power Over The Appellate Jurisdiction of the Supreme Court," 109 U.Pa.L.Rev. 157 (1960); Eisenberg, "Congressional Authority to Limit Lower Federal Court Jurisdiction," 83 Yale L.J. 498 (1974).

[9] New York v. United States, 326 U.S. 572 (1946).

But what is the case here? It has been well described in another contest by Princeton's eminently respected Arthur Corwin: "The Supreme Court went on a virtual binge and thrust its nose into matters beyond its competence with the result that (in my judgment, at least) . . . it should have its aforesaid nose well tweaked. . . The country needs protection against the aggressive tendency of the Court."[10]

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[10] The New York Times, March 16, 1958.

PREPARED STATEMENT OF PROF. BURT NEUBORNE

Mr. Chairman and members of the subcommittee. Thank you for the opportunity to present my views on the constitutionality and propriety of several proposed bills which seek to limit the power of an Article III judge to grant affirmative injunctive relief in school desegregation cases. As a Professor of Law at New York University and an active civil liberties lawyer, I am deeply concerned both with the wisdom and the constitutionality of attempts to alter the institutional relationship between Congress and the Federal judiciary merely because members of Congress disagree with the remedial actions of several Federal District judges. Instead of relying on the Supreme Court to strike the proper remedial balance, these proposed bills seek to invade the province of the judiciary by imposing a legislatively mandated solution to a judicial problem. Nothing could be more dangerous to the principle of Separation of Powers.

Disagreement with the remedial actions of the Federal judiciary in school desegregation cases cannot obscure the fact that, over time, an independent Federal judiciary is the single most important guarantor of freedom that we have today. In an era when pressures on the individual generated by a complex and contentious world have reached overwhelming proportions, the foresight of the Founders in providing for an institutional check on majoritarianism is one of our great national treasures. If we hope to be as free in the year 2000 - and beyond - as we are today, we dare not dismantle the institutional structure which has made the Federal courts such a potent force for individual freedom. It is, I suggest, profoundly dangerous to inflict a serious wound on the Article III judiciary merely because of single-issue pique. Even if the attempt were to succeed, the price to the nation would be enormous - a legacy of freedom endangered because of a single transitory dispute over remedial tactics. If, in fact, Congress possess the power - and the foolhardiness - to strip the Federal courts of the ability to fashion necessary remedies in school desegregation cases, the mischief cannot be confined to one area of the law. Similar exercises of a legislative veto over judicial action in defense of constitutional values can be expected whenever the judiciary acts effectively in protecting individual rights to the discomfiture of the majority. A judiciary which forges remedies in constitutional cases at the sufferance of the majority can hardly be called independent. If judicial independence is so compromised, the institution will have been mortally weakened and our system will have taken a grave step toward parliamentary supremacy in the European tradition. It is a step no one devoted to individual freedom can contemplate with equanimity. Thus, even if Congress possessed the power to enact legislation stripping the Federal courts of the power to grant necessary remedies in constitutional cases falling within their subject matter judisdiction, it would be a serious mistake to do so.

The issue, however, is not merely one of wisdom. The principle of Separation of Powers inherent in Article III of the Constitution places substantial constitutional limits on the power of Congress to interfere in the resolution of cases or controversies falling within the subject matter jurisdiction of an Article III court. Once a constitutional case comes within the subject matter jurisdiction of an Article III court, Congress may not interfere with its resolution by seeking to impose rules of decision on the judge or by seeking to deprive the court of necessary remedial powers. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

In discussing the scope of Congressional power in this area, the Supreme Court has found it helpful to differentiate four related, but distinct, concepts: standing; cause of action; subject matter jurisdiction; and remedy.

Standing is often used to describe the nature of the stake in a given dispute which a person must demonstrate in order to justify invoking the assistance of an Article III court. While the standing doctrine undoubtedly rests, in large part, on prudential considerations which may be the subject of Congressional legislation, there exists a core set of Article III components which limit the power of Congress to confer Article III standing on litigants who do not possess it and to remove it from litigants who are significantly affected by the dispute. Since it is clear that minority children who are confined to unconstitutionally segregated schools possess Article III standing, Congress would clearly lack power to seek to close the Federal courts to them on standing grounds.

The existence of a cause of action is often described as a theory pursuant to which a given source of law - statutes, common law precedents or constitutional norms - entitles a litigant to judicial assistance in altering the factual status quo. It is, of course, clear that to the extent a given cause of action is linked to a non-constitutional source of law, Congress has broad power in determining its scope. It is equally clear, however, that when a cause of action finds its source in the Constitution, Article III vests the judiciary with the final word on the merits of a constitutional claim. E.g., Ex parte Young, 209 U.S. 123 (1908). Legislative attempts to reverse the Supreme Court on the merits of a constitutional claim are doomed to failure as flatly inconsistent with the Separation of Powers.

Subject matter jurisdiction is often described as the power of an Article III court to entertain a given cause of action. Article III provides Congress with broad, but not unlimited power, to determine the subject matter jurisdiction of the Federal courts. For example, a bill which defined subject matter jurisdiction to exclude racial or ethnic groups from access to the Federal judiciary would, of course, be invalid. Similarly, bills which single out a specific constitutional issue and seek to remove it from the jurisdiction of the Federal trial courts raise troublesome issues of equality and purposeful avoidance of constitutional mandates. However, whatever the power of Congress to regulate subject matter jurisdiction, none of the bills currently before this sub-committee seek to follow that route. No one has even suggested that Federal courts be stripped of subject matter jurisdiction over cases involving unconstitutional racial segregation in the public schools. Instead, the bills adopt a confusing terminology by purporting to remove jurisdiction to provide certain remedies. Removing the power of a Federal judge to issue certain types of injunctive relief is not, however, a modification of jurisdiction - merely of remedial power. It is, therefore, at the level of remedies that these bills must be approached.

Congresses' power to regulate the remedial powers of an Article III judge, while broad, is subject to substantial constitutional constraints. Where the rights in question flow from non-constitutional sources, Congress, of course, possesses a virtually plenary power to define the appropriate remedies. However, since the substantive value of a right is inextricably intertwined with the remedies which exist to enforce it, when the source of a plaintiff's cause of action is constitutional, Congress may not strip the courts of traditional remedial mechanisms which the court deems necessary to the vindication of plaintiff's constitutional rights without affecting the substance of those rights. Once Congress vests an Article III court with subject matter jurisdiction involving a constitutional cause of action, it may not direct the court to decide the case a particular way. Only the judiciary may decide cases or controversies properly before it. E.g., United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). If Congress may not dictate the outcome of a case within the subject matter jurisdiction of an Article III court directly, it may not achieve the same result indirectly by stripping the court of power to issue relief needed to implement its decision. Indeed, if Congress were permitted to strip a court of remedial power necessary to the implementation of its decision, Federal courts would be reduced to the role of issuing advisory opinions - in blatant violation of the Case or Controversy rules of Article III. Thus, when a traditional remedy is necessary to the implementation of a decision in a constitutional case properly within the subject matter jurisdiction of a federal court, Article III courts possess inherent power under the Constitution to grant the remedy. E.g., Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); Davis v. Passman, 99 S.Ct. 2264 (1979); Carlson v. Green, 100 S.Ct. 1468 (1980).

Congress, if it wishes, may seek to take the Federal courts out of the business of deciding cases involving unconstitutionally segregated schools. Such a course of action would raise serious questions of policy and constitutionality. But, whatever the power to remove subject matter jurisdiction entirely, Congress may not vest an Article III court with subject matter jurisdiction over a given category of cases and, at the same time, forbid the court from granting the injunctive relief necessary to implement its judgment on the merits. Once Congress authorizes an Article III court to exercise subject matter jurisdiction over a case or controversy, Congress may not put its finger on the scales of justice by dictating the outcome directly, by enacting rules of decision; or indirectly, by denying the court power to enforce its decision.

Although disputes between Congress and the courts over the scope of remedial authority in constitutional cases have been rare, the Supreme Court has unequivocally upheld the power - and duty - of an Article III judge to provide those remedies required to implement his or her decisions on the merits. Thus, for example, in Jacobs v. United States, 290 U.S. 13 (1933), the Supreme Court ruled that Article III judges were empowered to award interest in cases arising under the Fifth Amendment despite the failure of the Tucker Act to grant them "jurisdiction" to do so.

Nor may Separation of Powers principles be avoided by phrasing the bills in terms of an alleged constitutional right to be free from certain remedies. Such an approach fails on two levels.

First, the Supreme Court has explicitly rejected the constitutional theory on which the bills are premised. E.g., McDaniel v. Barresi, 401 U.S. 39 (1971), reversing 226 Ga. 456, 175 S.E. 2d 649 (1970). The bills assert the existence of a constitutional right to be free from re-assignment to a given school on the basis of race. Precisely such a right was asserted by the Supreme Court of Georgia, only to be explicitly rejected by Chief Justice Burger on behalf of a unanimous Supreme Court in McDaniel v. Barresi, supra. Whatever Congress' power to legislate in favor of its vision of the constitution, it does not include the right to overrule the Supreme Court by legislation. Unless we are prepared to abandon our commitment to Separation of Powers, Congress may not claim to be the final arbiter of the meaning of the Constitution. The Supreme Court has spoken in McDaniel and, unless this subcommittee wishes to launch a radical assault on our form of government, the legal issue is closed - unless, of course, litigants persuade the Supreme Court to re-open the question.

Second, even if the Court had not explicitly rejected the theory on which the bills are promised, the notion that enforcement of a constitutional decision may be blocked by the legislative assertion of the rights of affected third parties strikes at the heart of the judicial process. Every judicial decision on constituional rights affects third parties. Indeed, the essence of the judicial process in a constitutional case requires a court to balance the rights of an individual plaintiff against the often legitimate concerns of third parties. That such decisions are difficult and, often, controversial goes without saying. However, it also goes without saying that the fact that such decisions are made by an independent judiciary, insulated from majoritarian pressures, is what differentiates our system of democracy from a European parliamentary system. If the legislature is permitted to unravel the fabric of judicial independence by second guessing constitutional decisions in the guise of enforcing the purported rights of affected third parties, the basic institutional relationships established by Marbury v. Madison will be fundamentally altered. Thus, whether one focuses specifically on the constitutional right which the bills purport to protect or on the general theory which underlies them, the result is the same - Congress lacks the power to strip the Federal courts of ability to grant necessary remedies in constitutional cases properly within their subject matter jurisdiction.

Of course, to recognize that Congress lacks power to deprive Federal courts of the ability to issue necessary remedies in constitutional cases is not to suggest that Congress may play no role in the remedial phase of a constitutional case. So long as Congressional action does not prevent a Federal court from enforcing its decision on the merits, Congress may - and should - exercise substantial authority in overseeing remedies for persons whose constitutional rights have been violated. For example, in connection with school de-segregation litigation, Congress may require a court to permit third-persons affected by a proposed remedial decree to intervene in order to assure that the Federal judge is aware of the factual implications of a given remedial decree. Alternatively, Congress could require the appointment of a guardian ad litem to represent the interests of affected third persons in any case in which busing or re-drawing of district lines is contemplated.

Similarly, Congress may establish a hierarchy of possible remedies in constitutional cases. Thus, Congress may require a Federal judge contemplating the issuance of affirmative injunctive relief in school de-segregation cases to certify that no less drastic remedy exists capable of implementing the decision on the merits. In connection with such certification, Congress may require that specific findings of fact be made in connection with issues relevant to the necessity for and scope of the remedial decree. Moreover, although the issue is not free from doubt, Congress may well be empowered to establish the burdens of proof governing contested fact-finding pursuant to such remedial hearings. Thus, an appropriate bill may:

(1) assure the participation of interested third parties during the remedial phase of a school de-segregation case;

(2) require a specific finding that no less drastic remedy exists capable of implementing the courts decision on the merits;

(3) require that specific findings of fact be made on contested issues relevant to the remedial decree; and

(4) establish the burdens of proof which govern the resolution of contested factual issues relevant to the remedial decree.

What Congress may not do is purport to give an Article III judge power to resolve a constitutional case or controversy by vesting him with subject matter jurisdiction while simultaneously removing the power to grant remedies needed to enforce his decree. It is, to say the least, hypocritical to invite minority plaintiffs to use a judicial forum which lacks power to vindicate their rights.

There is, however, a more positive role which Congress should play in the remedial phase of a school de-segregation case. Busing is resorted to by Federal trial judges because no alternative remedies exist which appear to hold out hope of remedying the constitutional violations which plaintiffs have endured. Judges, bound by tradition and appropriate self-restraint, are limited to a remedial armory which includes injunctions and compensatory damages, but little else. Congress, on the other hand, is free to explore the possibility of innovative remedial devices which will make constitutional plaintiffs whole, while sparing third-persons from disproportionate cost. Unfortunately, Congress' reaction to the remedial problem in school de-segregation cases has tended to be negative. However, if Congress genuinely wishes to end busing, it may not do so by simply seeking to outlaw it. Rather, it must explore the existence of alternatives which will provide minority children with their full constitutional rights. The pragmatic truth is that no Federal judge would order a minority child bussed from a genuinely superior minority school to an inferior integrated one. Congress wishes to provide an alternative to busing, let it authorize Federal judges to turn minority schools into demonstrably superior educational institutions. If we are not prepared to permit minority children to be bussed in order to attend integrated schools because it is too disruptive to third-parties, perhaps we can compensate the minority children, not in money, but in knowledge.

Unless Congress is prepared, however, to explore innovative alternatives to busing, it may not pursue a negative course which seeks to strip Federal judges of the only remedial device which can vindicate the constitutional rights of plaintiffs who have properly invoked the subject matter jurisdiction of an Article III court.

PREPARED STATEMENT OF PROF. DANIEL H. POLLITT

Thank you, Senator East for the opportunity to share with you my thoughts on this important topic. I appreciate the fact that your subcommittee is holding these hearings, that your subcommittee is anxious to hear all points of view.

I have brought with me today some of my students, who have helped me with my testimony.

My testimony is in three part.

Part 1 is a legal analysis of the issues in these bills. I will be brief on this point, knowing that testimony is coming from others.

I enclose an article I wrote with then Congressman Frank Thompson some ten years ago on the "busing" legislation proposed by President Nixon. His proposal resembles some of the bills now pending.

In this article, we discussed the McCardle-Yerger-Kline decisions and the authority of Congress to regulate the appellate jurisdiction of the Supreme Court. More to the point here, we also discussed the power of Congress to regulate the remedial authority of the "inferior courts".

In this connection we discussed Marbury v. Madison, and the obligation in civilezed governments to afford a remedy when rights are denied. We quoted Chief Justice John Marshall who wrote in 1803 that

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for a violation of a vested legal right".

We discussed Hayburn's Case, wherein Chief Justice Jay wrote in 1792 that Congress has no authority to limited the remedial powers of the federal courts because

> "the government is divided into three distinct and independent branches and it is the duty of each to abstain from, and to oppose, encroachments on either".

In this earlier article we discussed the Norris-LaGuardia Act, and the Portal to Portal Act; and the cases which agreed that Congress can deny federal courts the jurisdiction necessary to vindicate rights created by Congress; but that Congress cannot deny jurisdiction necessary to vindicate rights guaranteed by the constitution. We discussed a number of decisions, including that of Judge Chase in Battaglia v. General Motors Corp., 169 F. 2d 266 (2d Cir. 1948). He wrote that

> "the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirement of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise the power as to deprive any person of life, liberty, or property without due process of law or to

take private property without just compensation.

I enclose a copy of that article (Congressional Control Of Judicial Remedies) for the record.

I also enclose for the record two papers written by my students. One is by David Farren, written last year for the North Carolina Law Review; the other is co-authored by Ms. Emmett Boney and Mr. Tim Barger, written last year for my class in Constitutional law. Each article is on the Helmes School Prayer bill and present an exhaustive review of the authorities and qrguments for an against Congressional control of the federal courts. Mr. Farren and Ms. Boney are here in the audience, and I would like to acknowledge their contributions.

Part 11 of my testimony consists of brief statements by the students in a seminar I currently teach. I asked them to write from their personal experience, and to comment on a social, rather then on a legal, level.

Three of the students were in Charlotte when Judge McMillan ordered two-way cross-town busing. One was in Raleigh when two way integration became a fact. A fourth was one of the first group of white students assigned to the formerly black high school in Durham. Other students are from more rural areas; still others from out of state.

Several conclusions can be drawn from these diverse statements.

First, Busing is a fact of life; an accepted and normal way of getting to and from school.

Second, there are inconveniences in busing. A Catholic student was bused a great distance to his parochial school, past several public schools. A black student was bused some considerable distance past the nearest white school to maintain segregation. A student near a district line was bused several miles instead of walking two blocks across the district line to the nearest school. A student when in New Zeeland was bused a great distance when he elected to attend the co-educational high school.

Third, Despite the inconvenience on occasion, there was no objection to the bus ride. Its a pleasant part of the day.

Fourth Integration, especialy in the rural areas, has decreased the amount of time spent on the bus. Instead of going to the white school, or to the black school, students now go to the nearest school.

Fifth There was apprehension and fear when court-ordered busing began; racial tension and sometimes racial violence. For example, in Durham the black community resented the fact that long-requested repairs came only when white students were assigned to the formerly black school.

Sixth. The tensions and violence are largely over. Younger brothers and sisters in the same schools witness only the normal prejudices of the adult world: whites eat with whites; blacks with blacks.

Seventh. Socialization is a significant part of education; getting to know the world in which we live; those who inhabit it; getting to see the person behind the skin pigmentation. School integration, at the earliest age possible, is essential to this learning process.

Eighth. Busing is essential to school integration; because of segregated housing patterns.

I would like to introduce these statements into the record. I would also like to introduce a column by Tom Wicker. He tells about a dinner in Charlotte honoring attorney Julius Chambers (who argued the NAACP case for school integration) and Judge James McMillan (who ordered massive cross town busing). Ten years ago these two were pilloried for what they were doing. Last summer they were honored for what they had done. And the School Board in Charlotte canceled a scheduled meeting so members could be present and applaud.

Part III of my testimony is a brief history. The federal courts are given jurisdiction to entertain suits arising under the Constitution, the laws, and the treaties of the United States. They are given full tenure, and an assured salary, to secure an independ decision. Since the beginning of our Republic, their independent judgments on behalf of the constitution have created bitter controversy.

I enclose a briefing of an article by Charles Warren (Legislative and Judicial Attacks on the Supreme Court) which traces this developmant through 1913. Harriet Hopkins, a student, did the briefing. I~~s~~t tells of the many efforts to thwart the federal judiciary and its decisions: plans to impeach, plans to increse the size of the court; plans to decrease the size of the court; plans to require a super-majority vote when a statute is assailed under the Constitution; plans to create a "higher tribunal" (such as the Senate) for designated kinds of cases; plans to deny jurisdiction; and so on.

None of these efforts succeeded, except the one in McCardle when the Radical Republicans controlled the immediate post Civil War Congress; and that only in part.

The attack on the federal judiciary did not end in 1913 with Warren's article.

We are all award of Roosevelt's "Court Packing Plan" of the 1930s.

We are all aware of the recent efforts in Congress to deny federal courts of jurisdiction in cases of Habeas Corpus, in cases of contempt of Congress, in cases of state subversion laws, of bar admission, of school integration, of school prayer, of abortions, and today, of busing.

Todate, all of these efforts have failed. A majority of the Congress has determined that an independent judiciary is small price to pay for an occasion "bad" decision. If the decision hurts too many people too much, the appropriate remedy is a constitutional amendment. This is part of our history. Note the eleventh, the sixteenth, and the twenty-sixth amendments.

The route of the Constitutional amendment is slow and difficult~~y~~; but it reflects the wisom of our constitutional fathers in selected a system of checks and balances, of separation of powers, of the long second look.

In Conclusion, I would like to emphasize two concerns.

First, I fear for out very system of government if these bills are enacted into law. They would inflict a grevius body blow on our concept of an independent judiciary; of a government of checks and balances; of a government where individual liberty is preserved by diffuseing power among three coordinate but independent branches of government.

Second. I fear for the ideals of our Republic if these bills are enacted into law. Every school child learns to pledge allegiance to the concept of "one nation indivisible, under God, with liberty and justice for all".

These bills, if enacted, would lead us away from one indisible nation into two ~~hostil~~ hostile camps: one black, the other white.

These bills, if enacted, would deny to blacks and to whites alike, the libefty and justice now guaranteed by the 14th Amendment and twenty-five years of Suprmee Court decisions.

[Additional material submitted by Professor Pollitt is on file with the committee.]

CONGRESSIONAL CONTROL OF JUDICIAL REMEDIES: PRESIDENT NIXON'S PROPOSED MORATORIUM ON "BUSING" ORDERS

FRANK THOMPSON, JR.,* AND DANIEL H. POLLITT†

The school bus is a familiar sight on the American education scene. The big yellow bus criss-crosses the rural byways, or speeds along modern highways to the "consolidated" school, and picks up approximately forty percent of the children who go to school each day. For years, no one seemed to mind—except those who attended private parochial schools and therefore were denied this free transportation.

In the South, there were two buses: one carrying black children to black schools, and one carrying white children to white schools. No one seemed to mind—except the blacks who were denied an equal education.

Then, as the dual educational systems began to end, the black children rode the same bus with white children to the formerly "white" school, and "busing" became an issue. When it appeared that white children would be transported from the white suburbs to the formerly "black" inner-city schools, "busing" became a dirty word.

But not everywhere, and not for long. Consider, for example, the case of Hoke County, North Carolina. Hoke County is a small rural community of 18,000, with 4,850 children of school age: 50 percent black, 35 percent white, and 15 percent Lumbee Indian. For years, the county operated three different school and transportation systems. The white children were a year ahead of their black and Indian counterparts at the midway mark and two full years ahead by time of high school graduation. Then came integration, a unitary system under which each school, and each class, now reflects the county-wide population. But with integration came advance planning. Attention was focused on what happens at the end of the bus ride. There were conferences with fearful parents and apprehensive students. The capacities and achievements of each child were measured, and special needs and problems were identified and anticipated. The result was a marked success. White students continued to progress as before, and black and Indian students began to catch up. And the daily bus ride was cut down by an average of fifteen minutes.[1]

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*Member of the United States House of Representatives.

†Professor of Law, University of North Carolina School of Law.

[1] Mondale, *Busing in Perspective*, THE NEW REPUBLIC, March 4, 1972, at 18.

Senator Mondale, after two years as Chairman of a Senate Select Committee on Equal Educational Opportunity, reports that Hoke County is not an isolated or unique phenomenon. His conclusion, after two years of study of the problems nationwide, is that *"integrated education—sensitively conducted and with community support—can be better education for all children, white as well as black, rich as well as poor.* It has been tried and is working."[2]

But the facts are either not known or not accepted. Many parents fear that their children will be "bused" into alien neighborhoods, and they are eager for any relief. And some political candidates were eager to promise relief. "Busing" became the big issue in the Florida "Presidential primary," in which there was a separate "busing" referendum item on the ballot. On March 14, 1972, the people of Florida went to the polls, selected Alabama's Governor Wallace as their preference for the Presidency, and voted almost three-to-one against "compulsory busing."[3]

It was almost inevitable that the "busing" issue would reach national dimensions, and it did within a few days.

THE NIXON MORATORIUM PROPOSALS

On March 16, 1972, President Nixon announced on nation-wide television that he was sending to Congress two bills on "busing."[4] One was a bill "[t]o impose a moratorium on new and additional student transportation" and provides in essence that all existing court decrees "shall be stayed" to the extent that they require any school board to transport a student who was not being transported immediately prior to the entry of the court order.[5]

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[2] *Id.* at 17.

[3] The actual count was 78% against busing. *There Goes the Bus*, THE NEW REPUBLIC, April 1, 1972, at 13. Also, 79% of the Floridians voted for desegregated, "equal opportunity" public education. *Id.*

[4] The bills were introduced on March 20 by William M. McCulloch, the senior Republican member of the House Judiciary Committee. Mr. McCulloch subsequently repudiated them both when a thorough study convinced him that they were unconstitutional and unjust. When (then Acting) Attorney General Richard Kleindienst came to testify before the House Judiciary Committee in favor of the bills, McCulloch declared:

> It is with the deepest regret that I sit here today to listen to a spokesman for a Republican Administration asking the Congress to prostitute the courts by obligating them to suspend the equal protection clause (of the Constitution) so that Congress may debate the merits of further slowing down and perhaps even rolling back desegregation in public schools.

He asked the witness: "What message are we sending to our black people? Is this any way to govern a country? Is this any way to bring peace to a troubled land?" AFL-CIO News, April 15, 1972, at 6, col. 4.

The other Nixon bill was styled as one "[t]o further the achievement of equal educational opportunities."[6] On the positive side, it declares that all children enrolled in public schools "are entitled to equal educational opportunity without regard to race, color, or national origin,"[7] and then it authorizes the Secretary of Health, Education, and Welfare (HEW) and the Commissioner of Education to concentrate federal funds on "basic instructional services and basic supportive services for educationally deprived students."[8] It declares that "the neighborhood is an appropriate basis for determining public school assignments,"[9] and then it imposes certain limitations on the powers of the federal courts to remedy racially discriminatory school assignments and plans that are in violation of the equal protection clause of the fourteenth amendment. For those in the sixth grade and below, the proposed bill provides that "no court" shall implement a plan to end segregation that will increase "the average daily number of students" transported, the "average daily distance to be traveled," or the "average daily time of travel" over the comparable average for the preceding school year.[10]

Concerning those in the seventh grade and above, the proposed law provides that "no court" shall remedy a segregated plan of education with busing provisions that increase the average number of students transported, the average daily distance traveled, or the average daily time of travel, unless other techniques have been tried and found wanting.[11] These other techniques include free transfer of students from a school in which students of their race comprise a majority to a school in which their race is a minority; the revision of attendance zones or grade structures, if this can be done without increasing the transportation of students; the construction of new schools and the closing of inferior schools; and the establishment of magnet schools or educational parks.[12]

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[5] H.R. 13916, 92d Cong., 2d Sess. § 3(a) (1972). The moratorium was to begin th [illegible] fter the enactment of the bill and was to terminate either on July 1, 1972, or on the date of [illegible] neat of the companion bill, whichever was earlier.

[6] H.R. 13915, 92d Cong., 2d Sess. (1972).

[7] *Id.* § 2(a)(1).

[8] *Id.* § 101(a)(2).

[9] *Id.* § 2(a)(2).

[10] *Id.* § 403(a). (It has been the personal experience of one of the authors, who is the fathe of three children, that integration is easier and more effective at the first grade level than when i occurs at either the junior or senior high-school level.)

[11] *Id.* § 403(b).

[12] *Id.* § 402.

There is one other notable limitation on the courts: they are not to ignore or alter a school district line "except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, or national origin."[13]

So much for the "bare bones" of the proposed laws. Flesh was added at a White House Conference on March 17 when the highest administration officials "briefed" the press on the President's proposed laws.[14] Several items are of interest. The first is that the Administration sent the bills to Congress for enactment without studying the legal implications. The proposal law would curtail the power of the federal courts to implement their judgments, and a reporter asked, "Is there a precedent in case law for this kind of action?"[15] Attorney General (then Acting Attorney General) Richard G. Kleindienst replied in the negative. He said, "There is no precedent in exactly this kind of situation . . . ." The only analogy he could offer was that of the National Labor Relations Act, by which Congress had limited the remedies available to the National Labor Relations Board "to apply between employees and employers in representation [*sic*]."[16]

The second item of interest is that the Administration sent the bills to Congress without any study of the factual need for the proposed laws. Administrative officials were asked, "How much busing is going on now for the purpose of desegregation . . .?"[17] Wilmot Hastings, General Counsel of HEW, replied: "[W]e don't have any breakdown. . . . We have no data on miles, distance, or times, the breakdown, or what the relative amount of desegregation busing and nondesegregation busing amounts to."[18]

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[13] *Id.* § 404.

[14] Representing the Administration were John D. Ehrlichman, Assistant to the President for Domestic Affairs; George P. Schultz, Director of the Office of Management and Budget; Elliot L. Richardson, Secretary of the Department of Health, Education, and Welfare; and Richard G. Kleindienst, (then Acting) Attorney General; and several members of their respective staffs. White House Press Release, March 17, 1972, at 1 [hereinafter cited as Press Release].

[15] *Id.* at 9.

[16] *Id.*

[17] *Id.*

[18] *Id.* One can then only question the "findings" in § 2(a) of the proposed Moratorium bill: "For the purpose of desegregation, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students. . . . [T]hese reorganizations, with attendant increases in student transportation, have caused substantial hardship to the children thereby affected . . . ." H.R. 13916, 92d Cong., 2d Sess. §§ 2(a)(1)-(2) (1972).

The third item of interest is the political nature of the proposal. A reporter asked: "If, as the experts have testified here, we do not even know the extent of busing involved in the desegregation process, then what is the hard evidence that supports a Presidential call for a moratorium on busing."[19] John D. Ehrlichman, Assistant to the President for Domestic Affairs, answered this one:

> "I think you have come from some other planet not to be able to answer that question. Every place that you go around this country . . . this is the front burner issue in most local communities. . . .
>
> Now, that is the evidence. It carries by such a preponderance that it cannot just be swept under the rug by some sort of statistical evasion."[20]

The fourth item is that the President's proposals turn the clock back to 1896, the year in which the Supreme Court announced the "separate but equal" doctrine in *Plessy v. Ferguson.*[21] A reporter asked: "Why is this not a return to separate but equal; if the moratorium on busing stops future busing plans and the financing of inner city schools encourages and develops those schools."[22] Another reporter asked how the courts could end segregated education "without some form of transportation, since the facts of life are that blacks and whites don't live together."[23] The reply of Dr. Schultz, then Director of the Office of Management and Budget, can be reduced to this one sentence: "There is no necessary reason why one must desegregate everything."[24] But the equal education under the proposed laws will be not only separate but also unequal. Secretary Elliot Richardson of HEW told the reporters that the Administration was not asking for any funds for schools other than the amounts theretofore sought under earlier laws;[25] Dr. Shultz implied that there is no new money involved[26] and added that there no present plans to ask for future additional funds with which grade the quality of the inner-city schools.[27]

The purpose of this article is not to comment further on any aspe of the proposed bills, other than the constitutional issue of congressional control over the courts. But first, some retracing of recent history is necessary to know how we arrived at where we now stand.

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[19] Press Release at 24.
[20] *Id.*
[21] 163 U.S. 537 (1896).
[22] Press Release at 16.
[23] *Id.* at 24.
[24] *Id.*
[25] *Id.* at 7.
[26] *Id.* at 12.
[27] *Id.* at 20.

THE 1954 BROWN DECISION AND CONSEQUENT STATE EFFORTS TO CURB THE FEDERAL COURTS

Until 1954, the District of Columbia and some seventeen states required a dual segregated system of public education, and four additional states permitted segregation on a local-option basis.[28] The legal justification for a segregated school system rested on an analogy to the 1896 decision in *Plessy v. Ferguson*,[29] in which the Supreme Court had sustained the constitutionality of a Louisiana statute requiring separate but equal accomodations for white and black railroad passengers.

In 1954, the issue of segregated public schools was brought to the Supreme Court in five different cases that arose in Kansas, South Carolina, Virginia, Delaware, and the District of Columbia. In *Brown v. Board of Education*,[30] a unanimous Court refused to "turn the clock back . . . to 1896 when *Plessy v. Ferguson* was written"[31] and held that the forced segregation of Negro school children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[32] The Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[33]

The first shoe was dropped.[34] But "because of the great variety of local conditions"[35] involved in the five cases before it, the Supreme

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[28] Pollitt, *Equal Protection in Public Education: 1954-61*, 47 AAUP BULL. 197, 198 (1961).

[29] 163 U.S. 537 (1896).

[30] 347 U.S. 483 (1954).

[31] *Id.* at 492.

[32] *Id.* at 494.

[33] *Id.* at 495.

[34] The general initial reaction was one of resigned acceptance. The Governor of West Virginia immediately announced that his state would abide by the *Brown* decision. Governor Cherry said: "Arkansas will obey the law—It always has." Governor Whetherby announced that "Kentucky will do whatever is necessary to comply with the law." Oklahoma's Governor Raymond Gary warned that the school boards then contemplating defiance would get no aid or comfort from him; and similar statements were issued by the Governors of Virginia, North Carolina, and other southern states. *See* Pollitt, *supra* note 23, at 200-01 & n.30.

[35] 347 U.S. at 495.

Court put off the task of issuing an order until it could hear the views of all the parties (and interested intervenors) as to the appropriate next step. In 1955 the order came down.[36] The Court recognized that the termination of a segregated school system "may require solution of varied local school problems" and that the local school boards had the best knowledge and therefore the primary responsibility to resolve these problems.[37] Accordingly, the Supreme Court remanded the cases to the courts in which they had originated, with instruction that the local courts require the local school boards to "make a prompt and reasonable start" toward ending segregation and that the local courts maintain jurisdiction to ensure the admission of Negro students to the public schools on a racially nondiscriminatory basis "with all deliberate speed."[38]

By then, resistence in sone quarters had mounted to a fever pitch. Mob violence erupted when Autherine Lucy sought to enroll at the University of Alabama,[39] when James Meredith attempted to enroll at the University of Mississippi,[40] and when nine black students enrolled at the "white" high school in Little Rock, Arkansas. Governor Faubus put the Little Rock school "off limits" to "colored" students, ugly crowds drove the black children away,[41] and President Eisenhower dispatched federal troops to enforce the federal court "desegregation" order.[42] The resulting " 'chaos, bedlam and turmoil' " was cited as justifying a postponement of the school integration,[43] but the Supreme Court said "no." The Court ruled as follows:

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[36] Brown v. Board of Educ., 349 U.S. 294 (1955).

[37] *Id.* at 299. Contrast the proposal of President Nixon that the Congress "specif[illegible]te remedies for the elimination of the vestiges of dual school systems" throughout the land, w[illegible]er they exist. H.R. 13915, 92d Cong., 2d Sess. § 3(b) (1972).

[38] 349 U.S. at 300-01.

[39] Pollitt, *supra* note 23, at 201.

[40] James Meredith was not the first black to attempt enrollment at the University of Mississippi. Clennon King was the first. He was arrested while standing in line at the administration building and taken to a nearby state mental hospital for examination. Clyde Kennard was the second. He was arrested and later convicted of reckless driving as he approached the administration building. The first Negro to apply for admission to the University of Georgia was suddenly inducted into the Army, despite previous exemption due to physical disability; and another, after nine years of litigation and a Supreme Court decision in his favor, discovered that he was unable to qualify for admission to the University of Florida Law School under recently enacted admission standards. Pollitt, *supra* note 23, at 201.

[41] Cooper v. Aaron, 358 U.S. 1, 9-12 (1958).

[42] *See* Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C.L. Rev. 117 (1958).

[43] 358 U.S. at 12-13.

> The constitutional rights of [Negro school children] are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor . . . .
>
> . . .[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."[44]

And there were indeed many schemes, ingenious and ingenuous, to thwart the Supreme Court school integration decisions. First came the "interposition" or shocked-indignation statutes. In the legislative sessions of 1956 and 1957, some nine Southern states enacted interposition resolutions. Although they varied in detail, all condemned the *Brown* decision as an unconstitutional usurpation of legislative authority by the Courts, and all called for the state to "interpose" itself between the state citizens and the federal courts.[45] In 1960, the Supreme Court agreed with the federal district court in New Orleans that "interposition is not a constitutional doctrine. If taken seriously, it is an illegal defiance of constitutional authority."[46]

Then came a number of efforts, like the current Nixon proposals, designed to "curb" the federal courts in the area of school desegregation. First were the "get the judges" proposals. Since it was the federal courts that had ended segregated education (neither the Congress nor the President had taken any steps in this direction), the "logical" move by segregationists was to cleanse the courts of the "misguided" judges. "Impeach Earl Warren" signs appeared all over the South, and Georgia lead the way with a legislative resolution calling upon Congress to initiate impeachment proceedings against all the Justices of the Supreme Court.[47]

There was a parallel move to limit or eliminate entirely the power of the federal courts to rule on school segregation matters. Florida proposed a constitutional amendment that would have made all Supreme Court decisions in this area reviewable by the United States Senate.[48] Senator Eastland of Mississippi introduced legislation to deprive the Supreme Court of its appellate jurisdiction to hear school desegregation cases. This bill was defeated in the Senate by the narrow margin of forty-one to forty.[49]

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[44] *Id.* at 16-17.

[45] Pollitt, *supra* note 23, at 201. Compare the preamble of the Nixon Moratorium bill: "There is a substantial likelihood that . . . many local educational agencies will be required [by the courts] to implement desegregation plans that impose a greater obligation than required by the fourteenth amendment . . . ." H.R. 13916, 92d Cong., 2d Sess. § 2(a)(5) (1972).

[46] United States v. Louisiana, 363 U.S. 1 (1960).

[47] *See* Pollitt, *supra* note 23, at 202.

There were a number of additional efforts to prevent the federal courts from exercising jurisdiction. Louisiana "withdrew" its consent to be sued without prior legislative approval of each proposed law suit. Alabama declared that school boards are "judicial" bodies and, ergo, are immune from suit. Arkansas, Georgia, Louisiana, Texas, and Virginia authorized their governors to "seize and operate" the various school systems, with the hope and expectation that a suit against the governor would be considered to be a suit against the state and hence beyond the jurisdiction of the federal courts under the eleventh amendment.[50]

"Barratry" and "champerty" laws were enacted to disbar the attorneys who filed school integration suits,[51] and companion laws were passed to "get" the NAACP, which generally financed the law suits. These latter laws took many forms. Some required the discharge from state employment of all those who belonged to or contributed to the NAACP.[52] Others merely required the public disclosure of all members and contributors, with the hope and expectation that public pressure would do the job.[53] State sovereignty commissions, un-American activities committees, commissions on education, and similar state agencies were established to investigate "racial activities."[54] The chairman of the Virginia committee announced that his investigations would be devastating to the NAACP, would "'bust that organization . . . wide open,'"[55] and could be used to keep the NAACP out of litigation [illegible] is the heart of the organization.

But the federal courts, with the total support of the Supreme Co[illegible] stood firm in the face of this state legislative onslaught. All the above, and similar schemes for defeating the orderly processes of school desegregation, were declared unconstitutional. And, with the passage of time, the Supreme Court began to press for results.

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[48] *Id.*

[49] *Id.; see* Pollitt, *Should the Supreme Court be Curbed? A Presentation of Civil Liberties Decisions in the 1957-58 Term*, 37 N.C.L. REV. 17 (1958).

[50] Pollitt, *supra* note 23, at 202.

[51] *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963).

[52] *See, e.g.*, Shelton v. McKinley, 174 F. Supp. 351 (E.D. Ark. 1959).

[53] *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960).

[54] *See, e.g.*, Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963).

[55] Scull v. Virginia, 359 U.S. 344, 347 (1959).

In 1964 the Supreme Court ruled that "[t]he time for more 'deliberate speed' has run out . . . ."[56] In 1968 it ruled that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[57] In October 1969 it ruled that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."[58] In December 1969 the Supreme Court denied two requests for more delay, because "[t]he burden on a school board is to desegregate an unconstitutional dual system at once."[59]

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[56] Griffin v. County School Bd., 377 U.S. 218, 234 (1964). This case involved Prince Edward County, Virginia, one of the defendants in the 1954 *Brown* decision. After that adverse opinion, the county officials had closed the public schools and had contributed public support to "private" segregated white academies, leaving the black population substantially without any educational opportunities. The Court ordered the local school board to reopen the public schools and to cease giving financial assistance to the parents of the white children attending the "private" schools.

[57] Green v. County School Bd., 391 U.S. 430, 439 (1968) (emphasis by the Court). Here, the Supreme Court held that a "freedom of choice" plan that allows the individual pupil to choose his own public school does not constitute adequate compliance with the decision in *Brown v. Board of Educ*. There were two schools in the county and no attendance zones. Under the "freedom of choice" plan, all the white children chose the school formerly restricted to whites, and all but a handful of the black children selected the school formerly restricted to blacks. The Court ordered the school board "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442.

[58] Alexander v. Holmes County Board of Educ., 396 U.S. 19 (1969) (per curiam). In early July, the court of appeals ordered a number of Mississippi school systems to desegregate by the opening of the coming school year. In late August, the Department of Justice (on the recommendation of the Secretary of the Department of Health, Education, and Welfare) moved the court of appeals to delay the date of the integration order, and the court of appeals did so. *See* Alexander v. Holmes County Bd. of Educ., 396 U.S. 1218 (Black, Circuit Justice, 1969). The Supreme Court reversed and directed the school systems "immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color." 396 U.S. at 20.

[59] Dowell v. Board of Educ., 396 U.S. 269, 270 (1969) (per curiam); *accord*, Carter v. West Feliciana Parish School Bd., 396 U.S. 226 (1969) (per curiam). In *Carter*, the court of appeals on December 1, 1969, ordered certain plans for the desegregation of three Louisiana school districts but postponed the effective date of the plans until the school year of 1970-71. The Supreme Court reversed and ordered the plans implemented by February 1, 1970. In *Dowell*, the district court on August 13, 1969, ordered the revision of some school attendance boundaries by September 2, 1969. On August 27 the court of appeals reversed the "partial plan." The Supreme Court in turn reversed the court of appeals because the school board must "desegregate an unconstitutional dual system *at once*." 396 U.S. at 270 (emphasis added).

In Keyes v. School Dist. Number One, 396 U.S. 1215 (1969), the court of appeals had postponed a desegregation order "on the premise that public support for the plan might be developed" during the period of delay. *Id*. at 1217. Mr. Justice Brennan, sitting as a Circuit Justice, To comply with these decisions it is sometimes necessary to order that the children living in one segregated neighborhood attend schools located in a different neighborhood. This requires transportation, or busing. The constitutionality of this judicial remedy was decided for the first time in a series of cases decided in the spring of 1971.

THE 1971 BUSING CASES

In his television address of March 16, 1972, President Nixon came out against "busing children across a city to an inferior school just to meet some social planner's concept of what is considered to be the correct racial balance."[60] He also inveighed against "social planners who insist on more busing even at the cost of better education."[61] Earlier, he had told the nation that "I am opposed to the busing of children simply for the sake of busing."[62]

The implication in these statements is that the federal courts—from Chief Justice Burger on down—approved of busing "for the sake of busing," that the Supreme Court and the lower federal courts had embarked upon a massive busing program to achieve "racial balance" in each and every classroom throughout the nation. Nothing could be more erroneous.

In April 1971 Chief Justice Burger wrote three decisions, in which all members of the Supreme Court agreed, dealing with various and different "busing" problems. But nowhere in any of these opinions did the Court say anything directly or remotely to justify the implications in the President's broadside.

In *Swann v. Charlotte-Mecklenburg Board of Education*[63] district judge had ordered that all schools have approximately the racial balance "so that there will be no basis for contending that

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reversed. Citing the Little Rock case, Cooper v. Aaron, 358 U.S. 1 (1958), he said that "the desirability of developing public support for a plan designed to redress *de jure* segregation cannot be justification for delay . . . ." 396 U.S. at 1217.

[60] Stone, *Moving the Constitution to the Back of the Bus*, New York Review of Books, April 20, 1972, at 10.

[61] N.Y. Times, March 17, 1972, at 22, col. 1.

[62] This was on August 3, 1971, when he announced at a press conference that he had asked the Secretary of HEW to submit to Congress an amendment to the proposed Emergency School Assistance Act that would "expressly prohibit expenditure of any of those funds for busing." N.Y. Times, Aug. 4, 1971, at 15, col. 3. The Emergency School Assistance Act authorized the expenditure of $1.5 billion to aid and assist in the process of achieving a "unitary" school system. *Id.*

[63] 306 F. Supp. 1299, 1312 (W.D.N.C. 1969).

school is racially different from the others."[64] He also ordered that the children beyond walking distance be "bused" to their new schools. The Supreme Court unanimously approved of this "plan" under the particular situation existing in that city, stating that "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."[65]

In the companion case of *McDaniel v. Barresi*,[66] the Board of Education of Clarke County, Georgia (not the federal court) established geographic zones for the elementary schools, with the proviso that pupils in Negro residential "pockets" were to be bused to schools in other attendance zones. The resulting Negro enrollment ranged from twenty to forty percent in all but two schools, in which it was fifty percent. The white-black ratio in the system as a whole was approximately two to one. The Supreme Court also unanimously approved this plan because of the particular situation existing in that county.

In neither case did the Supreme Court approve fixed "racial quotas." In the *Swann* case, it approved the "norm" of a 71-29 white-to-black ratio in all the schools, but only as a "starting point" to end segregation. The Court expressly noted that had the district court required "as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does *not* mean that every school in every community must always reflect the racial composition of the school system as a whole."[67]

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[64] Charlotte had segregated residential patterns that had resulted in part from federal, state, and local governmental action. Prior to *Brown* Charlotte had a segregated dual school system. After *Brown* Charlotte embarked upon a school construction program, locating a series of small elementary schools deep within the different residential zones. In 1966, Charlotte abandoned its dual school system and assigned children to the school nearest their homes under a free transfer program. The result was that two-thirds of the Negro students attended 21 schools that were either totally or more than 99% black. The faculties and the school buses were equally segregated.

Judge McMillan ordered school assignment on a "satellite zone" basis. One black inner-city school was grouped with two or three white outlying schools; children from grades one through four were assigned to the outlying schools; and children in grades four through six were assigned to the inner-city schools. The Supreme Court approved of these gerrymandered school districts and attendance zones:

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situatons and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971).

[65] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

[66] 402 U.S. 39 (1971).

In both of these cases, the Supreme Court approved of the busing of some school children because "[d]esegregation plans cannot be limited to the walk-in school."[68] But the Supreme Court again was careful to note that there might well be limits imposed on future busing plans. The Court expressly warned the lower courts that "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."[69] The Court then added: "It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students."[70]

To underscore and emphasize this point, the Supreme Court noted the "busing" situation in each of the two cases before it. Under the new desegregation plan in Clarke County, "[t]he annual transportation expenses of the present plan are reported in the record to be $11,070 *less* than the school system spent on transportation during the 1968-1969 school year under dual [segregated] operation."[71] Under the new desegregation plan in Charlotte-Mecklenburg,

> [t]he trips for elementary school pupils average about *seven miles* and the District Court found that they would take "not over *35 minutes* at the most." This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of *15 mil* one way for an average trip requiring *over an hour.*[72]

It was because of "these circumstances" that the Supreme Cou firmed the use of "bus transportation as one tool of school desegregation."[73]

More germane to this article, however, are the Court holdings regarding the "broad remedial powers of a court" in school desegregation cases to order "interim corrective measures."[74]

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[67] 402 U.S. at 24 (emphasis added).

[68] *Id.* at 30.

[69] *Id.* at 30-31.

[70] *Id.* at 31.

[71] 402 U.S. at 40 n.2.

[72] 402 U.S. at 30 (emphasis added) (footnote omitted).

[73] *Id.*

The litigation in the *Swann* case began in the spring in 1969, and the district court then ordered the school board to consider a plan that included elements of "busing." The North Carolina General Assembly promptly enacted an "Anti-Busing Law."[75] This statute prohibited the local schools boards from doing any of three things: It provided that "[n]o student shall be assigned or compelled to attend any school on account of race . . .," that no student shall be assigned to any school "for the purpose of creating a balance or ratio of race," and that "[i]nvoluntary busing of students in contravention of this article is prohibited . . . ."[76] In *North Carolina State Board of Education v. Swann*,[77] the Chief Justice ruled for a unanimous Supreme Court that the state law was unconstitutional because "it operates to hinder vindication of federal constitutional guarantees."[78]

The Supreme Court concluded that the prohibition against school assignments on the basis of race "against the background of segregation"[79] in this case could not withstand constitutional challenge; otherwise it "would render illusory the promise of *Brown v. Board of Education*."[80] The Court concluded on this point that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."[81] To compel school authorities to be "color blind" and ignore factors of race would deprive them "of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems."[82] The Court similarly concluded that the "prohibition against transportation of students assigned on the basis of race" will hamper the ability "to effectively remedy constitutional violations," for "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."[83]

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[74] *Id.* at 27.

[75] Ch. 1274, [1969] N.C. Sess. L. 1495.

[76] N.C. Gen. Stat. § 115-176.1 (Supp. 1971).

[77] 402 U.S. 43 (1971).

[78] *Id.* at 45.

[79] *Id.*

[80] *Id.* at 46.

[81] *Id.*

[82] *Id.*

[83] *Id.*

In *McDaniel v. Barresi,*[84] it was similarly argued by those opposing the school integration that the fourteenth amendment required that the school authorities be "color blind" in making school assignment. The Supreme Court answered as follows: "The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes."[85]

The short of the matter is that the Supreme Court in the three cases held that a "busing" order is the "one tool" available to the federal courts that is "absolutely essential" for the vindication of constitutional rights. The question thus posed is whether the Congress can, consistent with the constitutional concept of separation of powers, deprive the courts of this essential remedial device.

THE ESSENTIALITY OF REMEDIES TO THE JUDICIAL PROCESSES

At the White House Press Conférence on March 17, the administration officials denied that the proposed "moratorium" on busing orders would undermine the constitutional right of black children not to be sent to segregated schools. They sought to distinguish between the "constitutional right" and the remedies for establishing this right.

A reporter asked: "The court has set a standard under Swann which it deems to be constitutional. Now, are you saying that what Congress should ordain is something less than what Swann declared?

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[84] 402 U.S. 39 (1971).

[85] *Id.* at 41. In *Swann*, those opposed to the integration order argued that the "busin[illegible] as prohibited by Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c, which provides [illegible] rt that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils . . . ." 42 U.S.C. § 2000c-6. The Supreme Court rejected this argument, and said:

> There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called "de facto segregation," where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action by state authorities. In short, there is nothing in the Act which provides us material assistance in answering the question of remedy for state-imposed segregation in violation of *Brown I*. The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

402 U.S. at 17-18.

Would it be constitutional then?"[86] White House Counsel Edward L. Morgan replied as follows: "We are saying that Congress has the power, under the substantive legislation, to define the limitations on the *remedy*. We are not in any way attacking the constitutional right."[87]

This attempt to distinguish between "rights" and "remedies" is subterfuge at best. A right without a remedy is like a bell without a clapper: an empty promise demeaning to the judge, breeding cynicism and disrespect for the processes of the law. This attempted dichotomy has no place in our constitutional heritage. To the contrary, the opposite has been the law since (and was even before) the landmark decision by Chief Justice John Marshall in *Marbury v. Madison*.[88]

On the very eve of his administration, President Adams appointed a number of "midnight" judges. One of them was William Marbury, who was appointed to a minor judicial office in the District of Columbia. But in the rush and confusion, the "commission" of Marbury was not delivered to him prior to the time President Jefferson took office. It was found in the Department of State, already signed and sealed, and Secretary of State Madison refused to deliver it. Marbury brought suit to compel its delivery, and the Supreme Court first held that he had a lawful right to it. The Court then moved on to "the second inquiry," which it stated as follows: "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?"[89] Chief Justice Marshall answered emphatically in the affirmative: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[90] The Chief Justice then added: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for a violation of a vested legal right."[91]

Both before and ever since the 1803 decision in *Marbury v. Madison* the Supreme Court has ruled that the power to issue a remedial order is an essential ingredient of the "judicial" power of the United States.

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[86] Press Release *supra* note 14, at 18.

[87] *Id.* (emphasis added).

[88] 5 U.S. (1 Cranch) 137 (1803).

[89] *Id.* at 162.

[90] *Id.* at 163.

On several occasions, unforeseen and unforeseeable circumstances deprived the Supreme Court of power to issue a judgment it deemed appropriate, and on these occasions the Supreme Court refused "to proceed to judgment"[92] because its judgment "would be incomplete and ineffectual."[93]

On other occasions, an Act of Congress rendered the judgments of the courts "incomplete and ineffectual," and on these occasions the courts were quick to call a halt. The issue arose as early as 1792. In that year the Congress enacted a "pension" law for the benefit of widows and orphans of the Revolutionary War veterans.[94] It directed the courts of the United States to hear the claims and determine the appropriate pensions. *But*, the courts were directed to certify their decisions to the Secretary of War, who was authorized to pay or to refuse payment in his discretion.

The Supreme Court refused to have anything to do with the claims, because the power given to the courts by the Pension Act was "not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional."[95] Mr. Chief Justice Jay noted that "the government . . . is divided into *three* distinct and independent branches and that it is the duty of each to abstain from, and to oppose, encroachments on either."[96] He concluded that since the Congress authorized the Secretary of War to review the decisions of the courts, the power given the courts by the Pension Act was not "judicial." Mr. Justice Iredell added that

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[92] Hunt v. Palao, 45 U.S. (4 How.) 589, 590 (1846). This case was an appeal to the Supreme Court from the Territorial Court for the Territory of Florida. While the appeal was pending, Florida became a state and the territorial court was abolished. Mr. Chief Justice Taney di[illegible]ed the appeal out of hand, because "there is no tribunal to which we are authorized to send [illegible] te to proceed further in the case, or to carry into execution the judgment which this [illegible] ey pronounce." *Id.*

[93] McNulty v. Batty, 51 U.S. (10 How.) 72, 80 (1850). Here, the case was on appeal [illegible] he Supreme Court from the Territorial Court in the Territory of Wisconsin. Pending appeal, Wisconsin became a state and the territorial court was abolished. The Court dismissed the appeal "because there is no court in existence to which the mandate of this court could be sent to carry into effect our judlment. Our power, therefore, would be incomplete and ineffectual, were we to consent to a review of the case." *Id.*

[94] Act of March 23, 1792, ch. 11, 1 Stat. 243.

[95] This quote is from a note appended to the opinion in United States v. Ferreira, 54 U.S. (13 How.) 40, 52, 53 (1851), which summarizes the results of United States v. Todd, a 1792 case unreported at the time, and the opinions expressed by the justices of the Supreme Court in the note to Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792).

[96] Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792) (emphasis in original). The Supreme Court made no decision in *Hayburn's Case*, but the opinions of the judges of the Circuit Courts of New York, Pennsylvania, and North Carolina are given in a note. These judges consisted of at least one Supreme Court Justice per circuit. *See* United States v. Ferreira, 54 U.S. (13 How.) 40, 49-50 (1851).

> the Legislative, Executive and Judicial departments, are each formed in a separate and independent manner . . . .
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> . . .*[N]o decision of any court of the United States can, under any circumstances . . . agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature* itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.[97]

Mr. Justice Wilson added that "[i]t is a principle important to freedom that in government, the *judicial* should be distinct from, and independent of, the legislative department."[98] He wrote that the Pension Act reservation of power in the legislature to revise and control the "judgments" of the judiciary was "radically inconsistent with the independence of that judicial power which is vested in the courts."[99]

On the few subsequent occasions when Congress sought to regulate or control the judgments of the Supreme Court, the legislative interference was declared to be unconstitutional.[100] Thus, in *Gordon v. United States*[101] Congress had by special statute retained the right to refuse to pay the judgments issued by the Supreme Court, and as a consequence the Court refused to hear any cases arising under the statute. Mr. Chief Justice Taney explained that "[t]he award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power"[102] and that the Constitution confers no authority "to the legislative or executive departments to interfere with [the] judgments or processes of execution" of the Supreme Court.

It appears from all the sources, then, that the issuance of remedial orders is an integral part of the judicial process, and if the courts are to act at all, their judgments are immunized from Congressional control. That moves us on to the next question: Does Congress have constitutional authority to deny the federal courts the power to hear and decide busing cases?

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[97] 2 U.S. (2 Dall.) at 412-13 (emphasis added).

[98] *Id.* at 411 (emphasis in original).

[99] *Id.*

[100] *See, e.g.*, Muskrat v. United States, 219 U.S. 346 (1911); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851).

[101] 117 U.S. 697 (1864).

[102] *Id.* at 702.

CONGRESSIONAL CONTROL OVER THE APPELLATE JURISDICTION OF THE SUPREME COURT

President Nixon's proposed Equal Educational Opportunities Bill provides that "no court" shall order the implementation of a desegregation plan that requires an increase in the number of children "bused" to school.[104] This language, if enacted into law, would prohibit the Supreme Court from issuing the type of order it issued last spring in the *Swann* opinion.

At the Press Conference on March 17, (then Acting) Attorney General Kleindienst was asked if there were any precedent for this kind of action, and he replied in the negative.[105] However, he might have cited the immediate post-Civil War period when the Reconstruction Congress sought to twist the Supreme Court appellate jurisdiction for political objectives. In order to understand properly that turn of events some background is helpful, for the matter is somewhat technical and complicated.

The Constitution provides that the "judicial Power" of the United States shall extend to eight categories of cases: to those affecting ambassadors and other public ministers; to those arising under the Constitution; to those in which the United States shall be a party; to those between citizens of different states; and so on.[106] The Constitution also provides for two categories of courts: "one supreme Court," and such "inferior Courts" as Congress may from time to time ordain and establish.[107]

The Constitution provides that the two most important categ of cases (those "affecting Ambassadors" and those "in which a shall be a Party") are to be tried originally in the Supreme Co and that "in all other Cases" (the other six categories) the Supreme Court shall have "appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*."[108]

The question here, of course, is whether the power given Congress

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[103] *Id.* at 700.

[104] H.R. 13915, 92d Cong., 2d Sess. § 403 (1972).

[105] *See* text accompanying note 16 *supra*.

[106] U.S. CONST. art. III, § 2.

[107] U.S. CONST. art. III, § 1.

[108] U.S. CONST. art. III, § 2 (emphasis added).

to make "exceptions" and "regulations" includes the power to deny entirely the right to appeal a case in which constitutional rights are allegedly denied the litigant.

So much for the constitutional background of the post-Civil War cases. The statutory background is equally complicated and technical. It involves at least three separate but interrelated laws: one was enacted in 1789, a second in 1867, and the third in 1868.

In 1789 Congress enacted a Judiciary Act and authorized the lower federal courts to decide (by way of a writ of habeas corpus) the legality of the imprisonment of those confined under the "authority of the United States."[109] If the lower court affirmed the legality of the imprisonment and dismissed the writ of habeas corpus, the one held in custody could appeal this decision to the Supreme Court. But the appellate process was not spelled out or generally known; in fact it was described as being "attended by some inconvenience and embarrassment."[110]

In 1867, Congress amended the 1789 Habeas Corpus Act in two major respects:[111] first, it authorized the lower federal courts to hear the cases of those confined under both federal *and* state authority; secondly, it expressly provided for an appeal to the Supreme Court and spelled out the processes therefor. This brings us to the facts of the first case.

During Reconstruction, when the Southern states were under military occupation, a Mississippi editor named McCardle was an "unreconstructed rebel." He published in the *Vicksburg Times* an editorial that severely criticized the Yankee general in command of that area. The General arrested McCardle and held him for trial before a military tribunal on charges of inciting to insurrection, disorder, and violence. He did this under the authority granted him by the Reconstruction Acts.

McCardle filed a petition for habeas corpus with the federal court under the 1867 Habeas Corpus Act, alleging that the Reconstruction Acts were unconstitutional and therefore could not justify his incarceration. The federal circuit court dismissed his petition. McCardle appealed to the Supreme Court, again under the 1867 Habeas Corpus Act. The Government then moved to dismiss his appeal on the theory that the 1867 Habeas Corpus Act was intended to help the former slaves, not rebel editors like McCardle. The Supreme Court denied the motion to dismiss the appeal[112] and heard oral argument on the merits of the case.

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[109] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81.

[110] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 324 (1868).

[111] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

Congress then took an unprecedented step. Fearing that the Court might hold the Reconstruction Acts unconstitutional, Conress passed a law that expressly repealed the 1867 Habeas Corpus Act in so far as the earlier law "authorize[d] an appeal" to the Supreme Court.[113] The United States for a second time moved to dismiss the appeal, this time with success.[114]

The Supreme Court held that because McCardle had filed his appeal under the Habeas Corpus Act of 1867, the appellate provisions of which had been expressly repealed by Congress, the Court had no option but to dismiss the case. But, the Court also pointed out quite clearly that it was error for McCardle to suppose that "the whole appellate power of the court, in cases of *habeas corpus*, is denied", for the repealing act of 1868 "does not except from that [appellate] jurisdiction any cases but appeals from Circuit Courts under the act of 1867," and it "does not affect the jurisdiction which was previously exercised" under the original Judiciary Act of 1789.[115]

In short, the Supreme Court in *McCardle* was not faced with the power of Congress to deny *all* appellate jurisdiction of the Supreme Court to determine important constitutional issues. All the Court held in *McCardle* was that Congress can cut off one of two or more alternate appellate routes to the Supreme Court.

Any doubts on this score were resolved by *Ex parte Yerger*[116] [illegible]h was decided by the same Court in the same year. Yerger, like M[illegible], was a civilian who, also like McCardle, was arrested by the m[illegible]y authorities in Mississippi and held for military trial. He filed a petition for a writ of habeas corpus with the federal court in Mississippi, and the writ was denied. He then filed an appeal to the Supreme Court *under the original Judiciary Act of 1789.* The United States moved to dismiss the appeal, relying as it had in *McCardle* on the 1868 "repealing" statute. The Supreme Court refused to dismiss the appeal, holding that the case was before it under the 1789 Act and that the "repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867."[117]

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[112] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 327 (1868).

[113] Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

[114] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

[115] *Id.* at 515.

[116] 75 U.S. (8 Wall.) 85 (1869).

United States v. Klein[118] arose as a result of the second and last attempt by the Reconstruction Congress to utilize the courts for political ends, and again Chief Justice Chase was quick to say no. The facts were these. In 1862 Congress declared the forfeiture of all property owned by those "aiding or abetting [the] rebellion."[119] This 1862 "forfeiture" law also authorized the President to grant amnesty to those who had engaged in the rebellion.[120] On December 8, 1863, President Lincoln took advantage of this option and proclaimed to certain persons a pardon and amnesty, thereby restoring all rights of property "except as to slaves" to "every such person who shall take and subscribe a prescribed oath of allegiance, and thenceforward keep and maintain said oath inviolate."[121] Under the Forefeture Act of 1862, the Government had seized and confiscated some cotton belonging to a man named V.F. Wilson, who had "aided the rebellion." After Lincoln's offer of "amnesty" in 1863, Wilson took the required oath of allegiance and "kept the same inviolate"[122] until his death. Then one Klein, who was appointed to administer Wilson's estate, filed suit in the Court of Claims to recover the value of the seized cotton (125,000 dollars). A number of other similar suits were filed, including one by Edward Padelford that became the test case.[123] General Sherman had captured Savannah in December 1865 and had seized some cotton belonging to Padelford. Thereafter Padelford took the required oath of allegiance under Lincoln's 1863 amnesty proclamation and filed suit in the Court of Claims for the return of his cotton. The Supreme Court affirmed his right to recover. This did not sit well with Congress. The idea of rebels swearing allegiance at this late stage of the war and thereby recovering their property was too much for it to accept.

The Supreme Court handed down its *Padelford* decision on April 20, 1870, and by July 12 Congress had struck back. There were to be no more decisions against the public treasury in favor of former rebels, Presidential pardon or not. Congress provided that in all suits filed to recover property held by the Government under the 1862 "seizure" law, if the former owner relied upon a Presidential pardon as the basis for recovery, the claim of Presidential amnesty "shall be taken and deemed in such suit . . . conclusive evidence that such person did take part in and give aid and comfort to the late rebellion . . . and the jurisdiction of the court in the case shall cease and, the court shall forthwith dismiss the suit of such claimant."[124]

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[117] *Id.* at 106.

[118] 80 U.S. (13 Wall.) 128 (1872).

[119] Act of July 17, 1862, ch. 195, § 6, 12 Stat. 591.

[120] *Id.* § 13, at 592.

[121] 80 U.S. (13 Wall.) at 132.

[122] *Id.*

[123] United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870).

By the time Congress enacted this statute, Klein had won his suit (on the basis of the Presidential pardon) in the Court of Claims, and the Government had appealed to the Supreme Court. The Government then moved the Supreme Court to dismiss the case and rule against Klein because of the recently enacted Congressional statute.

The Supreme Court denied the motion. Chief Justice Chase acknowledged a general right in Congress to "confer or withhold the right of appeal"[125] to the Supreme Court from decisions of the Court of Claims. "And," continued the Chief Justice, "if this act did nothing more, it would be our duty to give it effect."[126] But the act did something more than merely withhold appellate jurisdiction—it withheld appellate jurisdiction "*as a means to an end*."[127] The Chief Justice held that this is not a legitimate "exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power"[128] of the Supreme Court.

The Chief Justice declared that "[i]t is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others."[129] He concluded that in this inst "congress [had] inadvertently passed the limit which separates th lative from the judicial power,"[130] and he continued as follows:

> Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? The question seems to use to answer itself.[131]

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[124] Act of July 12, 1870, ch. 251, 16 Stat. 235.

[125] 80 U.S. (13 Wall.) at 145.

[126] *Id.*

[127] *Id.* (emphasis added).

[128] *Id.* at 146.

[129] *Id.* at 147.

[130] *Id.*

[131] *Id*

As a separate and additional reason for its refusal to dismiss the case, the Court pointed out that the act of Congress also intruded upon the constitutional power of the President to grant pardons. It said:

> To the executive alone is intrusted the power of pardon . . . .
>
> . . . [T]he legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. . . . This certainly impairs the executive authority and directs the courts to be instrumental to that end.
>
> We think it unnecessary to enlarge. The simplest statement is the best.[132]

Had the Chief Justice thought it necessary to enlarge, he might have added that the judicial branch of the government is charged with the power and obligation to ensure that the other branches of government are kept within the limits set by the Constitution. This was decided as early in our history as 1803 in the famous case of *Marbury v. Madison*.[133] There, Chief Justice John Marshall had to decide what to do when an act of Congress went one way[134] and the Constitution went a different way.[135] He had no problem. He wrote that "[i]t is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . ."[136] Equally significant was his follow-up: "It is emphatically the province and duty of the judicial department to say what the law is."[137] He explained that were it otherwise, were the courts impotent to act when the Congress overstepped the constitutonal limits, the Constitution would give "to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits";[138] were it otherwise, it would reduce

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[132] *Id.* at 147-48.

[133] 5 U.S. (1 Cranch) 137 (1803). See text accompanying notes 88-91 *supra* for a discussion of a different aspect of *Marbury*.

[134] Congress provided by law that the Supreme Court would have *original* jurisdiction to issue writs of mandamus to those holding office under the authority of the United States. Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 80.

[135] The Constitution provides that the Supreme Court shall have *original* jurisdiction only in two categories of cases, those affecting ambassadors and those in which states shall be a party. U.S. CONST. art. III, § 2. It does not say that the Supreme Court would have *original* jurisdiction to issue writs of mandamus to those holding office under the authority of the United States.

[136] 5 U.S. (1 Cranch) at 177.

[137] *Id.*

[138] *Id.* at 178.

"to nothing what we have deemed the greatest improvement on political institutions—a written constitution . . . ."[139]

The obligation and power of the courts to fault an act of Congress for reasons of unconstitutionality has not been challenged since the *Marbury* decision of 1803. It goes without saying that this is not an easy or pleasant task. The Framers of the Constitution recognized this and gave back-up support to the judiciary with permanency in office (the judges "shall hold their Offices during good Behavior"),[140] with financial independence (their compensation "shall not be diminished during their Continuance in Office")[141] and though the express charge that the judges exercise jurisdiction and hear all cases "arising under this Constituton."[142]

But, the fact remains that the Supreme Court can hear these cases alleging unconstitutional action by Congress only by way of appeal from the lower courts; and the Constitution contains the proviso, as an addendum to all the other powers granted the Supreme Court, that its appellate jurisdisdiction is subject to "such Exceptions, and under such Regulations as the Congress shall make."[143]

Is this small qualifying clause to be read as authorizing Congress to deny to the courts the power to review those cases challenging the constitutionality of congressional action and thereby overrule an almost unbroken line of 170 years of history? Not unless one is willing to let an exception engulf the rule; not unless one is willing to read the Constitution as authorizing its own destruction; not unless one is willing to l one small tip of the tail wag a very large dog.

What, then, is the intent and purpose of this qualifying p regarding the appellate power of the Supreme Court? The histor meager, but it points to a much more limited purpose.

Various proposed drafts of the Constitution were submitted to the Founding Fathers in Philadelphia, and all of them provided for appellate review by the Supreme Court of constitutional cases "both as to law and fact," without any qualification whatsoever. This touched off a heated controversy, with some of the delegates protesting that this clause, permitting review "as to fact," would give the Supreme Court the power to review and overturn the verdicts of juries. The various proposals were then given to a "Committee of Detail," which reported back the language as finally adopted: the Supreme Court should have appellate jurisdiction "both as to Law and Fact," but "with such Exceptions and under such Regulations as the Congress shall make."[144]

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[139] *Id.*

[140] U.S. Const. art. III, § 1.

[141] *Id.*

[142] *Id.* § 2.

[143] *Id.*

Alexander Hamilton explained the purpose of the "exceptions and regulations" clause in the debate over the Constitution:

> The appellate jurisdiction of the Supreme Court . . . will extent to causes determinable in different modes, some of the course of the COMMON LAW [that is, by jury trial], others in the course of the CIVIL LAW [without jury trial]. . . . [I]n the later, the reexamination of the fact [by an appellate court] is agreeable to usage [but not in the former]. . . . To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. . . .
>
> This view of the matter, at any rate, puts it out of all doubt that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no reexamination of facts where they had been tried in the original causes by juries.[145]

Patrick Henry agreed with Hamilton that the power given the Supreme Court to determine appeals "both as to law and fact" would, if unmodified, give the Supreme Court authority to review and overturn jury verdicts; he also agreed that the clause authorizing Congress to make "such exceptions" to the appellate jurisdiction was designed to allay fears on this score. However, Henry doubted that the qualifying clause authorizing Congress to make exceptions could, even if exercised by Congress in the situation of jury trials succeed in its purpose. He argued to the Virginia Convention called to ratify the Constitution that power once given to the Supreme Court by the Constitution to review questions "of law and fact" could not then be taken away by Congress. He commented on the floor: "I may be told that I am bold; but I think myself . . . that Congress cannot, by an act of theirs, alter this jurisdiction as established. . . . It is subject to be regulated, but is it subject to be abolished?"[146] He answered in the negative, because "[i]f Congress can alter this part, they will repeal the Constitution";[147] and further, "When Congress, by virtue of this sweeping clause, will organize these courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution would be void."[148] He concluded that "[i]f Congress, under the specious pretence of pursuing this clause [the "exceptions and regulations" clause], altered it, and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare that prohibition nugatory and void."[149]

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[144] *Id.*

[145] THE FEDERALIST No. 81, at 513-14 (B. Wright ed. 1961) (A. Hamilton) (emphasis in original.)

The late Mr. Justice Owen J. Roberts also commented on the "exceptions and regulations" clause, and he agreed with Alexander Hamilton and Patrick Henry that its thrust was to alleviate the fears that the Supreme Court, under authority previously given, might review and reverse the verdicts of juries. He asked a luncheon meeting of the New York Bar why the Framers left it to Congress to regulate the appellate jurisdiction of the Supreme Court, and then he answered his own question in these words:

> There came into play state pride . . . and another feeling that since Anglo-Saxons prize the jury system, giving the Supreme Court appellate jurisdiction as to matters of law and fact would give it the opportunity to overturn jury verdicts, jury decisions, judgments based on jury decisions in New York, in Pennsylvania and elsewhere. T best compromise that could be made in the situation was to leave Congress the right to define the appellate jurisdiction of the Supreme Court.[150]

In short, recourse to history indicates that the mischief which the Framers intended to remedy with the "exceptions and regulations" clause was the fear that without it the Supreme Court might review and reverse the factual findings of juries.

Whatever validity this historical basis for the clause might have today, the fact remains that the Congress, with few exceptions, has honored the integrity of the Supreme Court's appellate jurisdiction. On the few occasions when the Congress has not done so, the Supreme Court was quick to assert its judicial supremacy: in *McCardle*, in which the Court permitted the Congressional blocking of one appellate route while loudly pointing out an alternative road to its bench;[151] and in *Klein*, in which the Supreme Court proudly asserted that the congressional control over its appellate docket could not be used as a means to the end of ensuring that the decisions of the Court would not be adverse to the government and favorable to the suitor.[152]

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[146] III ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 540 (2d ed. 1836).

[147] *Id.*

[148] *Id.* at 540-41.

[149] *Id.* at 541.

[150] Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1, 3 (1949).

If the Congress could not tell the Supreme Court how to rule on cases in those post-Civil War years (against the "rebels"), there is no reason to believe that the same Constitution now permits the Congress to tell the Supreme Court how it should effectuate the fourteenth amendment (against the black school children).

CONGRESSIONAL CONTROL OVER THE "INFERIOR" FEDERAL COURT

The thrust of the proposed Nixon moratorium bills will fall most heavily not on the Supreme Court, but on the district courts of the United States, for in those courts the school integration cases are tried and remedial orders are first issued. May the Congress, consistent with our constitutional system of "checks and balances," deny them the power to issue "busing" orders if the district court judges are convinced that such orders are necessary for the vindication of constitutional rights? The answer is, "Probably not."

The Constitution provides in article III that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[153] This power to "ordain and establish" inferior courts carries with it the power to establish inferior courts with less than complete jurisdiction. Thus, the very first Congress established "inferior" federal courts and gave them jurisdiction to hear and decide cases between citizens of different states but, added the Congress, not those suits between citizens of different states involving negotiable instruments transferred to the plaintiff by a citizen who resided in the state of the defendant.[154] This "incomplete" grant of jurisdiction was sustained by the Supreme Court in 1799.[155]

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[151] *See* text accompanying note 115 *supra*.

[152] *See* text accompanying note 127 *supra*.

[153] U.S. CONST. art. III, § 1

Since that early date, Congress has granted the federal courts jurisdiction that is full or partial, complete or incomplete, as Congress has deemed wise and expedient.[156] As a general proposition this is perfectly proper, for there is no right to try a case in a federal court. Thus, in *Kline v. Burke Construction Co.*,[157] a construction company was incorporated in one state, Kline was a citizen of a different state, and the company filed suit against Kline in the federal court basing jurisdiction on "diversity of citizenship." Kline, the defendant in the federal suit, promptly filed suit against the company in a state court, hoping that the state forum would be more friendly to his cause. The company then asked the federal court to enjoin the state court proceeding, and the federal district court refused. On appeal, the Supreme Court agreed that the construction company did not have a "constitutional right" to have its case tried in the federal court:

> The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.[158]

There are many illustrations of the power of Congress to ta the jurisdiction of the federal courts, in whole or in part.[159] The LaGuardia Act is a familiar one. There, Congress declared that unless certain enumerated conditions existed, "[n]o court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . ."[160] The

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[156] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 23-24 (2d ed. 1970).

[157] 260 U.S. 226 (1922).

[158] *Id.* at 234.

[159] The Johnson Act of 1934, 28 U.S.C. § 1342 (1970) (originally enacted as Act of May 14, 1934, ch. 283, § 1, 48 Stat. 775), provides that the federal courts are not to enjoin or restrain the utility rates made by a state agency so long as a "plain, speedy and efficient remedy may be had in the courts of such State." The Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1970) (originally enacted as Act of Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738), similarly provides that no federal court is to enjoin or restrain the collection of any tax under state law "where a plain, speedy and efficient remedy may be had in the courts of such State."

[160] 29 U.S.C. § 107 (1970) (originally enacted as Act of [illegible]

Supreme Court said as dictum that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."[161]

However, the Supreme Court is not so casual when the denial of federal jurisdiction also constitutes a denial of substantive constitutional rights.[162] And, a series of decisions by the various courts of appeal under the Portal-to-Portal Act[163] recognize that Congress may not exercise its control over the "inferior" federal courts in a manner that denies those courts the power to vindicate rights guaranteed by the Constitution. Some background to these decisions might be useful.

The Fair Labor Standards Act[164] requires the payment of minimum wages, with time-and-a-half for hours worked in excess of an eight-hour day or a forty-hour week. In a series of cases at the close of World War II, the Supreme Court ruled that once an employee had crossed the portal of his place of employment, the "work day" and the "work week" included such preliminary and incidental activities as walking to the place where the work was to be done, changing to work clothes in the locker room, showering after work was over, and so on.[165] These decisions were quite unexpected and resulted in "windfall" obligations to thousands and thousands of employees. Almost two thousand suits were filed for back pay, claiming liability in excess of five and one-half billion dollars. The House Judiciary Committee investigated the situation and concluded that payment of these claims would result in the bankruptcy of thousands of employers.[166]

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[161] Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) (footnote omitted). Shinner, who sought and obtained an injunction in the lower federal court, argued only that the picketing in front of his store did not constitute a "labor dispute" within the meaning of the Norris-LaGuardia Act because none of the pickets were employed by him. He did not argue that he had a constitutional right to a federal court injunction against labor union picketing.

[162] *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965). There, a federal law forbade federal courts to "stay proceedings in a state court." Nonetheless, the Supreme Court approved of a federal court injunction against a threatened state criminal prosecution because the state criminal law "chilled" the exercise of first amendment freedoms. *See also* Lipke v. Lederet, 259 U.S. 557 (1922), where a federal law forbade federal courts to entertain any suit "for the purpose of restraining the assessment or collection of any tax." The Supreme Court, despite this jurisdictional barrier, issued an injunction against the collection of money allegedly due under a federal tax law. The Court's conclusion was that the amount of money demanded was an "unconstitutional penalty" and thus not a "tax."

[163] 29 U.S.C. §§ 251-62 (1970).

[164] 29 U.S.C. §§ 206-07 (1970).

[165] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Jewell Ridge Coal Corp. v. Local 6167, UMW, 325 U.S. 161 (1945); Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123, 321 U.S. 590 (1944).

[166] The legislative background and the ensuing statute are discussed at some length in Seese v.

Consequently, Congress passed the Portal-to-Portal Act,[167] which did two things. First, it provided that no employer shall be subject to any liability under the Fair Labor Standards Act because of a failure to pay minimum wages or overtime compensation for work performed in the past unless the work activities were compensable at the time they were performed by either an express contract or by custom or practice.[168] Secondly, the Portal-to-Portal Act provided that "[n]o court of the United States . . . shall have jurisdiction of any action or proceeding . . . to enforce liability . . . for or on account of the failure of the employer to pay minimum wages or overtime compensation" unless the work activities were compensable at the time performed by contract, custom, or practice.[169]

Motions were immediately made to dismiss the cases then pending in the federal courts. The plaintiffs argued against these motions for two reasons: because the Portal-to-Portal Act deprived them of property rights guaranteed by the fifth amendment to the Constitution, and because, a fortiori, the denial of access to a federal court to enforce these claims was also unconstitutional. If Congress has absolute control over the "inferior" federal courts and can choke off their jurisdiction even when this results in the inability to enforce rights protected by the Constitution, none of the courts would have considered the first iss raised by the plaintiffs in the pending cases. But all of them did. Th all considered and rejected the contention that the Portal-to-Por denied property rights guaranteed by the Constitution.[170]

Typically, Judge Parker of the Fourth Circuit wrote that Congress may not "take one man's property and give it to another or arbitrarily strike down rights arising under contract."[171] But, he added, "nothing of that sort is involved" in the Portal-to-Portal Act, because the rights stricken down by the statute are not rights arising out of contract but rights created by statute, which can be destroyed by the same power that created them.[172] Judge Parker then concluded:

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[167] 29 U.S.C. §§ 251-62 (1970) (originally enacted as Act of May 14, 1957, ch. 52, 61 Stat. 84).

[168] 29 U.S.C. § 252(a) (1970).

[169] *Id.* § 252(d).

[170] *E.g.*, Fisch v. General Motors Corp., 169 F.2d 266 (6th Cir. 1948); Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948); Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948); Rogers Cartage Co. v. Reynolds, 166 F.2d 317 (6th Cir. 1948).

[171] Seese v. Bethlehem Steel Co., 168 F.2d 58, 64 (4th Cir. 1948).

> Since the provisions of sec. 2(a) of the act, striking down portal to portal claims not based on contract, custom or practice are valid, there can be no question as to the validity of sec. 2(d) denying jurisdiction to the courts to entertain the claims. . . . Whether the denial of jurisdiction would be valid if the provision striking down the claims were invalid is a question which does not arise.[173]

In a portal-to-portal suit in the Sixth Circuit (where the same issues were raised), Judge Hicks concluded that the Act "in no way interferes with the powers of the judiciary."[174] He then added that "[s]hould Congress undertake to withdraw from the courts jurisdiction to consider and determine pure questions of ownership or title to property . . . a more serious question would be presented, but we are not confronted here with such a case."[175]

Judge Chase was even more pointed in the portal-to-portal suit in the Second Circuit. He wrote for that court as follows:

> A few of the district court decisions sustaining section 2 of the Portal-to-Portal Act have done so on the ground that since jurisdiction of federal courts other than the Supreme Court is conferred by Congress, it may at the will of Congress be taken away in whole or in part. . . . *We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment.* That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[176]

President Nixon, of course, is asking Congress to do what it did not do in the Portal-to-Portal Act—"to interfere with the power of the judiciary to protect rights vested under the"[177] Constitution. His proposals challenge not only "busing" but also the very idea of law itself.

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[172] *Id.*

[173] *Id.* at 65.

[174] Fisch v. General Motors Corp., 169 F.2d 266, 272 (6th Cir. 1948).

[175] *Id.* at 273.

[176] Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (emphasis added) (footnote omitted).

[177] Fisch v. General Motors Corp., 169 F.2d 266, 272 (6th Cir. 1948).

The portal-to-portal cases strongly indicate that Congress has no power to withhold or restrict the jurisdiction of the "inferior" courts when the withholding or restriction of that jurisdiction would deny or deprive persons of property rights guaranteed by the fifth amendment. It follows that Congress has no power to withhold or restrict the jurisdiction of the "inferior" courts when the withholding or restriction (as suggested by the Nixon "busing" proposals) would deny school children of the rights already declared to be theirs under the equal protection clause of the fourteenth amendment.

CONCLUSION

President Nixon wants to put the Constitution on the back of the bus and to give the federal courts a second-class citizenship among the three independent branches of government. He has found a scapegoat but no solution to a difficult problem.

Many parents have legitimate concerns that their children will be transported from "nice" neighborhoods into schools that are old, dirty, dilapidated, over-crowded, understaffed, and located in the "bad" section of town. But if the schools are harmful for one child, they are harmful for all children.

The problem is not the bus ride, but what one finds when the bus ride ends. The solution is to replace the bad schools and to upgrade the educational opportunities within them. This requires money, much more than the token amount requested by the President.

But improvement of the schools is not enough. Education has [illegible] to shoulder a disproportionate share of the burdens of overcoming [illegible] effects of segregation. We should now put our efforts in overcoming economic barriers, in overcoming segregated housing patterns, so that every neighborhood will have its own desegregated school. But that, unfortunately, lies in the future. As for the immediate present, we can do no more than applaud the remarks made by Florida Governor Reubin Askew when he asked the people of Florida to repudiate the anti-busing proposal on the ballot in that state:

> I hope we can say to those who would keep us angry, confused and divided that we're more concerned about a problem of justice than about a problem of transportation.
>
> And that while we're determined to solve both, we're going to take justice first.[178]

[From the New York Times]

IN THE NATION—BUSING AFTER A DECADE

(By Tom Wicker)

CHARLOTTE, N.C.—The irony was not lost upon the sponsors of a dinner honoring attorney Julius L. Chambers and federal Judge James B. McMillan.

Here was the Charlotte chapter of the National Conference of Christians and Jews giving a silver medallion to the black lawyer who in 1969 argued one of the most important school desegregation cases, *Swann v. Mecklenburg*, and another to the white judge who in that case first ordered busing as a remedy for segregated schools.

At the same time, in the United States Senate, North Carolina's Jesse Helms was leading a fight to prevent the Department of Justice from taking part in any suits to desegregate schools by the use of busing. Only the dilatory tactics of a Republican liberal, Lowell Weicker of Connecticut, had so far prevented the House-approved busing ban from passing the Senate—which it did in 1980, only to be vetoed by President Carter.

Busing is, in fact, moribund if not dead as a remedy for school desegregation where it still exists. Already, Congressional action prevents the Department of Education from requiring busing as a precondition for Federal aid to a school district; already, Attorney General William French Smith has pledged not to seek desegregation through busing.

But anything as radical as a legislative ban on busing suits ought to be opposed by a President who styles himself a conservative. After all, in some cases in which busing alone can end segregation, the ban will prevent Mr. Reagan from carrying out his oath to enforce the Constitution. Moreover, his Department of Justice is being deprived of jurisdiction it has traditionally and constitutionally exercised.

But Mr. Reagan, long an opponent of busing himself, is yielding the powers of his office under pressure from radicals on his right, like Mr. Helms, who claim that Americans are "sick and tired" of busing. And that was the real irony of the dinner in Charlotte.

For if busing neither works perfectly nor has total support in the largest city in Jesse Helms's home state,* * * the schools are improving and the community is widely judged the better for the experience and the men who brought it about are now honored for doing so.

"Everybody who's anybody is here tonight," a Charlotte newspaperman said of the audience of 300 blacks and whites that turned out for the McMillan-Chambers dinner. And a Charlotte Observer editorial said the next day: "It was a happy occasion, one that ought to cause considerable reflection elsewhere in the country.

The editorial called the Helms busing ban "a mistake" that "would postpone the resolution of black-white conflict in education and perpetuate racial attitudes that have helped polarize many American communities." Because of busing, it argued, Charlotte is no longer polarized in that way. "Schools are no longer black or white, but are simply schools. As a result, the racial composition of surrounding areas is not as critical as it once was. The center city and its environs are a healthy mixture of black and white neighborhoods."

Julius Chambers, who was cited by the Conference not just for school desegregation but for improving race relations, responded that for blacks too, Charlotte was a better place to live today than it was when he set up practice here in 1965—and a better place, he suggested, than numerous non-Southern and still segregated cities to which his civil rights practice had taken him.

Judge McMillan has frequently said that he knew little about Charlotte's schools when the desegregation case reached him in 1969 but that he found the evidence of unconstitutional segregation in his home community "over-whelming." And he told the dinner audience that he had not hesitated to order busing as a tool for desegregation because it had been for so long used as a tool to maintain segregation.

The judge and Mr. Chambers were both reared in rural North Carolina, and both were bused substantial distances to their schools—segregated schools. "The bus was all right," Judge McMillan once said, "as long as it was used to carry the right color student to the right destination."

Neither he nor Mr. Chambers even referred to the intense local hostility both suffered as a result of the 1969 busing decision. Both were ostracized and threatened, Judge McMillan hanged in effigy, Mr. Chambers's home and office bombed. Busing was orginally resisted by parents' groups, civic and school officials; but the current school board canceled its own meeting to attend the McMillan-Chambers dinner.

All of which raises a point no one mentioned at the dinner but which those who would ban busing might well ponder: What kind of equity is it to say to cities like Charlotte, which have accepted and made the best of busing, that no others will have to undergo such soul-searching, or be made to face their self-imposed deficiencies?

Senator EAST. Would the next panelists please come forward? If you will please indulge us for a moment, we are going to put you in a particular order here that will facilitate things for us.

We welcome you this morning, and we appreciate your taking your time to come and assist us in looking into this rather important matter of the constitutional implications of this bill. Senator Baucus asked me to express his regret that he needed to attend another meeting at the moment. He hopes to be able to make it back.

I appreciate his being here as much as he has been, yesterday and today. We have one final set of hearings after our early October recess, in the middle of October, but I do again want to publicly thank him for taking his responsibility here very seriously. We all run up against this problem of not being able to be two or three places at one time. Unfortunately, the Senate is sometimes structured that way.

We will continue on. As you are all aware, and as I had indicated to the earlier panelists, your printed remarks will be made a permanent part of our record that we will then be able to examine. We would be most appreciative if you would please state your conclusions on the basic matter you are testifying about and give us a concise rationale for it. Then that will allow me time to ask questions, and also Senator Baucus if he is able then to return.

I remind you of the painful problem of time and would appreciate your being as concise as possible. I do not wish to be so rude as to pull a stopwatch on you but, if it begins to careen out of control, I would like to reserve the right to raise a caution flag if not a stop sign.

The benefit you will give to me and to any other Senator who may be here is to get a good, concise statement of your position and then allow me to explore and at least get the fundamental areas in focus. We will have time, of course, at our own pace to go over this and to see if what we are doing is sound or not so sound, and to make the appropriate adjustments.

I will not read the biographies we have except to say, as I had with the previous panelists, you are people of great distinction, scholarly and professionally. We would like to think that if that were not the case we would not be blessed to have you here, so we will not read the biographies except to note again the common denominator of all of them is considerable distinction, no question about that.

I do welcome this morning Professor Graglia of the School of Law of the University of Texas in Austin, Tex.; Pro. Laurens Walker of the School of Law of the University of Virginia in Charlottesville, Va.. We also have with us Mr. Robert Meserve, who is the past president of the American Bar Association and currently a practicing attorney in Boston, Mass.; and Mr. Robert Eckhardt, who is an attorney here in the Nation's Capital, we certainly wecome him; and Mr. J. Harold Flannery, a practicing attorney from Boston, Mass.

Thank you, gentlemen. We shall simply start with Professor Graglia and move from left to right, with no particular significance being suggested either philosophically or in terms of quality of testimony. We are very egalitarian here with our panels.

Professor Graglia.

STATEMENT OF PROF. LINO A. GRAGLIA, SCHOOL OF LAW, UNIVERSITY OF TEXAS, AUSTIN, TEX.

Professor GRAGLIA. Thank you, Senator East. I am very appreciative of the opportunity to be here.

If I may, I would like to start by saying that I think that your statement on what you called your second point, on the relationship between Congress and the Court and on congressional power to limit the courts was an excellent one, a very thorough and I think complete and sound statement.

I very much regret that Senator Baucus could not remain because I think he was asking the right questions about the *Swann* case and the problems here. I would very much like to address to him, if I could, what I think are the right answers to those questions.

All I really want to address is one point, the appropriateness of congressional action limiting the courts. I really do not think that there is much dispute about the tragedy of busing. Even those on the other side cannot really get up much ability to defend busing any more. Busing is a national tragedy. The more you know about it, the more you experience it, the more you are convinced that this is so—in what busing is doing to our schools, our cities, what it is doing to our people in loss of faith in their ability to control their Government, loss of faith that their Government is rational.

I also think there really is no doubt, on the basis of the constitutional text, on the basis of democratic principle, on the basis of precedent, that Congress can indeed control the courts so as to prevent busing. It can very appropriately simply remove the jurisdiction from any Federal court to require the exclusion of children from neighborhood schools because of their race. There is no real difficulty.

The problem we face here, as was emphasized especially by opponents on the former panel, is that of appropriateness. The difficulty to be overcome is the feeling of unseemliness; that is, shouldn't Congress be deferential to the courts? Is there something inappropriate in bringing about confrontation? I think there is not.

The deference that Congress has shown to the courts is grossly unwarranted in light of what the courts have in fact been doing. Congress definitely should get up the courage, sufficient determination, to act on the busing problem. Anything else is really a continued abdication of its responsibility.

Let me say that on this question of deference, the need for deference, Congress has in fact already legislated many times on the busing problem. Indeed, it did so in its first important legislation, the great 1964 Civil Rights Act, the turning point in this area.

Now let us just look at what the courts have in fact done, very briefly. The 1964 act addresses busing. The 1964 act is the Federal statute that ended segregation in the Nation's schools. The schools are not segregated today; they are racially imbalanced but segregation—State laws requiring assignment to school by race, prohibited in *Brown*, stopped in the schools shortly after the 1964 act and as a result of that act.

In that act Congress stated very clearly that "desegregation means the assignment of children to school without regard to race." Congress went on to state this again in negative form, that "desegregation does not mean assignment for racial balance or the transportation of children for racial balance."

Congress legislated on busing; it anticipated the busing problem. Indeed, anticipation of the busing problem was the only ground on which anybody opposed the 1964 Civil Rights Act, or at least title IV having to do with education. Congress went on to say a third time in the 1964 act that the act does not authorize any official of the United States or any court to require the transportation of children to schools for racial balance.

Congress went on to say a fourth time in that act—trying to assure the opponents of the act, the representatives of the South who presciently feared that what would happen is exactly what has happened—went on to say for the fourth time that under this act students may be assigned to school on any basis other than race.

Now as Senator Humphrey said, "You cannot get any clearer than that." Senator Humphrey was the floor manager of the act. The ultimate assurance that Senator Humphrey gave that this act would not become a tool of racial balance and busing—which, however, is what it has become—was that he insisted, quite correctly at the time, that busing and assignment by race for racial balance would be unconstitutional even if Congress had not explictly and repeatedly prohibited it in the act.

As he said, and I quote:

> While the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation because it would be handling the matter on the basis of race and we would be transporting children because of race.

Congress addressed and dealt with the busing problem back in 1964. The problem is that the courts have so abused the 1964 act that their behavior cannot be properly described as anything other than scandalous. We speak of deference but if any other institution or official of Government behaved as the courts have behaved in regard to the acts of Congress in this area, we would not be speaking of deference; we would be speaking of something very different.

Now, how did busing come about in the *Swann* case, the first busing case? In the face of this legislation and this legislative history, the Supreme Court said in the *Swann* case that all these restrictions in the 1964 act, these definitions of desegregation and what was not to be done under the act, had no application to the South, that they applied only to the North where there had not been segregation. The Court did this without a word of support in the text of the act or in its legislative history. The Supreme Court simply undid and read out of the act everything that Congress did to prevent busing.

I submit, Senators, that this is judicial misbehavior requiring, and deserving censure, not discussion at this time of deference. The

Court simply did in the act without the least possible justification, as Senator Sam Ervin, who was very closely involved with the act and then with the *Swann* case, said—and I cannot improve on his words—he said:

> The act says in words as plain as it is possible to be in the English language that it did not authorize busing for racial balance. Congress could not have found simpler words to express that concept, yet in *Swann* the Supreme Court ignored that definition and said that desegregation requires that school boards take into consideration matters of race in making assignments.
>
> But then the Congress decided to take no chances with the courts so it put in something that even a judge ought to be able to understand. It not only defined desegregation affirmatively but also defined what desegregation is not. The Supreme Court adopted exactly the opposite interpretation of the meaning of the word "desegregation." It said, in effect, that in the *Swann* case "desegregation" does mean the assignment of children to schools in order to overcome racial over imbalance.* * *
>
> There is not a word in the whole title that indicates any intention of Congress to regulate "de facto segregation" based on residence, yet the Supreme Court nullified this act of Congress by holding that Congress was a bunch of legislative fools and that Congress had attempted to regulate "de facto segregation" instead of "de jure segregation."

Now that is what the Court has done. There is no justification for that, and Congress should rightly do something effective about it. Congress did attempt to do something, in a pathetically futile way, I must say—about the *Swann* case.

The following year—*Swann* was 1971—the following year Congress passed the Education Amendments of 1972, and in the Education Amendments of 1972 Congress addressed what the Court had done to the 1964 act in the *Swann* case and tried to say to the Court: "Court, you got it wrong. The 1964 act was not meant to apply only in the North. It was meant to apply also in the South." Indeed, all of the restrictions in the act were put in at the insistence of representatives of the South and of course to protect the South.

Therefore, Congress in the 1972 act enacted this pathetic measure: It says that title IV of the 1964 act, "shall apply to all public school pupils and to every public school system, public school and public school board, as defined in title IV, under all circumstances and conditions, and at all times, in every State, district, territory, commonwealth or possession of the United States regardless of whether the residence of such school pupils or the principal offices of such public school system, public school or public school board is situated in the Northern, Eastern, Western, or Southern part of the United States"—a pathetic, futile whimper of a hopeless, helpless branch in the face of the Supreme Court, not the voice of the elected representatives of a sovereign people.

That is the pathetic measure that Congress adopted, and of course the courts ignored it, never mentioned it, and it indeed deserved to be ignored. Congress then in the 1974 Education Act dealt with the matter of busing in great detail. Senator Baucus asked about other remedies. Professor Neuborne suggested other remedies. The 1974 act lists all these so-called other remedies, other than busing. It has not had the slightest effect in preventing busing.

This talk of other remedies, I would like to say to Senator Baucus, is completely misleading. The fact of the matter is, if you want to have racially balanced schools in racially imbalanced neighborhoods you are going to have to transport the students. There is no other way.

The basic problem is that the courts are insisting on racially balanced schools. They are mistaken in doing so. They say that they are not insisting on integration or racial balance as such or for its own sake, that they are only bringing about desegregation. That is demonstrably untrue. The racial imbalance that exists in our Nation's schools is not the result of past segregation. They are seeking racial balance.

There is almost nothing about the *Swann* case that is not invalid or basically dishonest, not only what the Court did to the 1964 act but its treatment of the facts. Nothing the Court said it was doing, corresponds to what the Court actually did.

The Court was simply being dishonest in *Swann*. It is the Supreme Court, subject to no review. It said it was only requiring that blacks not be excluded from any school or be required to attend what had been black schools under the segregated system. That is not true. That is not what the busing ordered was in fact doing.

The Court said that the lower courts found that the school board had been uncooperative and recalcitrant. That is not true. No such finding occurs in the lower court opinions. The lower court opinions praised the school board for being cooperative.

I do want to stop or I could go on extensively. The point I would like to make is that the courts have behaved very badly. It is a serious charge, it should not be made lightly, but what we have here is judicial misfeasance of the worst kind. It is entirely appropriate, indeed it is necessary, that Congress effectively act.

Thank you.

Senator **East**. Thank you, Professor Graglia.

Professor Walker.

STATEMENT OF PROF. LAURENS WALKER, SCHOOL OF LAW, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VA.

Professor **Walker**. Mr. Chairman, I want to thank you and the subcommittee for inviting me to come here and to comment on this proposed Neighborhood School Transportation Relief Act of 1981.

I would like to say to you that since the beginning of my teaching career I have taught courses in Federal civil procedure with particular emphasis on the U.S. district courts. From time to time I have taught a course in remedies. My research and writing interests have been generally focused on those subjects, and I have been particularly interested in the function and role of the judge.

I describe these professional interests so that you will understand the areas of my competence and understand my proposal to concentrate on the question of the authority of the Congress under section 1 of article 3 of the Constitution to regulate the jurisdiction of the inferior Federal courts. I am aware that authority for the proposed action in the bill may also exist under section 5 of the 14th amendment and that there are sound arguments for such a contention, but perhaps I can make best use of the committee's time by addressing rather directly the authority of Congress to take the proposed action under article 3.

If I might just briefly recall the specific mechanism, the specific action proposed by this bill is to provide that no jurisdiction shall exist in any inferior Federal court to issue an injunction, writ, process, and so forth in three specifically and very narrowly described situations. The first relates to the assignment or transportation of public elementary or secondary school students for the purpose of altering racial balance. The second relates to closing schools and transferring students for the same purpose, and the third relates to the jurisdiction to use these remedies to enforce certain contract provisions between the faculty, administration, and the schools.

Thus, in a more general way, the particular mechanism chosen for carrying out the stated purposes is the elimination of the jurisdiction of the inferior Federal courts to provide certain remedies, primarily the injunction, and this in three rather narrowly specified situations. Hence, by looking directly at the statute the question arises as to whether the Congress has the constitutional authority to take this proposed action.

In my opinion, Mr. Chairman, the Congress does have that authority both because ample precedent exists for such action and, more broadly, because the chosen technique is not inconsistent with the fundamental plan of judicial administration incorporated in the Constitution.

Permit me first and very briefly to review the precedent for the proposed action. Obviously the starting point is section 1 of article 3. I think it is always good to start with the language of the Constitution which provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish.

While it might be argued that article 3 requires the Congress to establish inferior Federal courts invested with the full scope of article 3 jurisdiction—and that argument may be made here today—I would like to emphasize that that point of view has been repeatedly rejected by the Supreme Court. While the extensive quotation of language is really unnecessary, I would like to read just a phrase or two from some of these opinions because the language is so direct and so clear that I think one really cannot appreciate the force of that authority without considering some of the language.

As early as 1799, Justice Chase in the course of an argument in *Turner* v. *The Bank of North America,* commented:

> The political truth is that the disposal of the judicial power, except in a few specified instances, belongs to the Congress. Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject in every form which the Constitution might warrant.

Particularly cogent is the language of Justice Daniel in the case of *Carrie* v. *Curtis,* which goes back to 1845, in which he wrote that the judicial power of the United States is, and I quote:

> Dependent for its distribution and its organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals inferior to the Supreme Court for the exercise of the judicial power and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to the Congress may seem proper for the public good.

I think the precision of that statement and its relevance to this proposal is particularly significant, Senator East.

In another case—I will just cite this case—*Sheldon* v. *Sill* in 1850, Justice Grier spelled out the rationale, and came to the same conclusion that the Congress, having the power to establish these courts, must define their respective jurisdictions.

In concluding this Supreme Court treatment of the subject, as recently as the past term of the Court in *Allen* v. *McCurry,* a 1980 decision, Justice Stewart in writing for the Court in an opinion which reversed the court of appeals' holding, commented on the court of appeals decision and said this:

> The assumption of the court of appeals appears to be that every person asserting a Federal right is entitled to one unencumbered opportunity to litigate that right in a Federal district court, regardless of the legal posture in which the Federal claim arises.

Justice Stewart said:

> The authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no guarantee but leaves the scope of the jurisdiction of the Federal district courts to the wisdom of the Congress.

I would like to summarize by saying there is a line of authority in the U.S. Supreme Court decisions running from 1799 to 1980 which seems, to me at least, to establish clearly the authority of the Congress to take the proposed action and use the mechanisms which are incorporated in this bill.

There are other precedents—and I will just name these and not describe them—legislative precedents. These legislative precedents go back to the Anti-Injunction Act of 1793, which prohibits a court of the United States from granting an injunction to stay proceedings in a State court. In 1932 the Congress passed the Norris-LaGuardia Act which we have already discussed. That statute, by the way, was apparently drafted by Professor and later Justice Frankfurter, who adopted this exact mechanism, the removal of jurisdiction.

There are other statutes: The Johnson Act, depriving the district court of jurisdiction to enjoin State ratemaking orders; the Tax Injunction Act of 1937. These actions by the Congress have gone virtually unchallenged, virtually unquestioned.

Therefore, that is a review of the precedents. It seems to me clear that the Congress has the power to do this.

I realize my time is getting short. I would like to just allude to the second point, that I think the proposal is consistent with the overall, fundamental constitutional plan. It leaves open the State courts to adjudicate these claims and to furnish the remedy which may be prohibited by this Federal legislation.

I understand that perhaps you, other members of the subcommittee, other members of the Congress might not approve of the State courts using the busing remedy but I think it is significant in looking at the system that this bill does not affect the jurisdiction of the State courts. It can be demonstrated—I will not read the citations—but it can be demonstrated that probably in the original plan the State courts were thought of as the primary guardians of Federal rights.

One question has come up recently about this proposed role of the State courts and I would like to mention it quickly. It may be true that under title 28 of the United States Code, section 1441, that defendants in State court actions would have the opportunity to remove school desegregation cases from the State courts to the Federal courts. Hence it might be argued that, as a practical matter, if this legislation were enacted the combination of this general removal statute and the proposed legislation would eliminate the busing remedy throughout our court system.

To me this argument depends to a very considerable extent on speculation as to what course of action local school board defendants would take in such State court actions, and I think that it is much too thin a basis to claim that the proposed legislation would really alter the fundamental constitutional plan regarding the relations between the State and the Federal courts and the availability of the State forum.

Nevertheless, if it were a serious contention that the effect of the removal statute draws in question the authority of Congress to pass this proposed legislation, I would favor some adjustment of the removal statutes to insure the continued availability of the State courts to consider the federally prohibited remedies. This adjustment might take the form of simply prohibiting removal from State to Federal court of cases seeking the remedies prohibited by the proposed legislation.

Such a change would permit plaintiffs to choose the Federal forum, knowing that the jurisdiction did not exist for these remedies, or to choose the State forum and have the option of seeking the federally prohibited remedies in State courts. That would seem to me a very fair resolution of the problem.

In summary, I have examined the precedents and I have looked at the overall constitutional plan. In my opinion, the Congress has clear authority to enact this statute as it is presently proposed.

Senator EAST. Thank you, Professor Walker.

Mr. Meserve?

STATEMENT OF ROBERT W. MESERVE, PAST PRESIDENT, AMERICAN BAR ASSOCIATION, ATTORNEY, BOSTON, MASS.

Mr. MESERVE. Thank you, Mr. Chairman, for the opportunity to appear before you to present the views of the American Bar Association in opposition to proposed legislation which would limit busing as an effective remedy where needed in Federal courts. Whether or not it be couched in jurisdictional terms, I think it is an unfortunate attempt by Congress—an unfortunate suggestion—to interfere with the jurisdiction of the Supreme Court of the United States and specifically with inferior courts.

I appear as a representative of the American Bar Association and I have in this situation specific instructions from my client, which I will refer to in a minute, to oppose all efforts by Congress to use your undenied article 3 power to regulate the jurisdiction of the Federal courts if the object of that regulation is to accomplish by indirection changes in substantive constitutional law, changes which the American constitutional system has entrusted to the amendment process.

However, I hasten to add that the American Bar Association has taken no position on the general policy of busing itself. Professor Graglia, exercising his right to engage in a little rhetorical exaggeration, has said to you that busing is a national tragedy. I would like to say in my turn that unconstitutional and de jure segregation and racial discrimination are a national disgrace, and the denial of constitutional rights to black persons in our society is a subject on which the courts have appropriately exercised every weapon in the judicial arsenal, including busing.

On August 11 the society which I represent, by an overwhelming, virtually unanimous vote of its democratically elected and fairly representative house of delegates, which speaks for a majority of this country's lawyers—280,000, I think, out of approximately 500,000 now admitted to the bar—approved a resolution which is appended to my paper, a resolution which states the association's opposition to the legislative curtailment of the jurisdiction of the Supreme Court of the United States or of the inferior Federal courts for the purpose of effecting changes in constitutional law.

A copy of that resolution and the accompanying supporting scholarly report is appended to my statement and, I submit, is well worth reading. I rely on the chairman's statement that that and the other material in my report will become part of the record here.

As the language of the resolution and the report make clear, the concern of the association focuses on possible efforts to manipulate jurisdiction, including jurisdiction to grant remedies—for example, busing—to achieve such substantive alteration of constitutional law as this Congress could not bring about by the passage of ordinary legislation or by any procedure short of constitutional amendment. The association which I represent has a long historical record of standing against proposals to alter our constitutional system by legislatively or through the executive process, limiting or curbing the role of the Federal courts.

In the early years of this century we opposed proposals that would have subjected Supreme Court constitutional decisions to recall by two-thirds majorities of Congress. However, more especially at the depths of the Great Depression—which I can remember from personal experience as a young lawyer—when court-curbing bills were numerous and President Roosevelt's court-packing plan was put forth, a general assembly of the association in 1936 adopted a resolution disapproving all bills "the purpose or effect of which was to limit the jurisdiction or abridge the powers as they now exist of any Federal court as at present constituted to pass upon the constitutionality of any law."

I point out that the Congress was moving there in an area where it had clear authority to fix the number of judges of the Supreme Court, to nominate and to elect them. Nobody disputed their authority. This was an attack on the issue of the wisdom of exercising that authority. In reliance on that action, the ABA successfully led the opposition to the President's plan to enlarge the Supreme Court.

Again, in 1958, with concern high in Congress over certain decisions of the high court on State and Federal antisubversion laws, the house of delegates resolved that: "Reserving our right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States, the American Bar Association opposes the enactment of legislation which would limit the appellate jurisdiction of the Supreme Court of the United States," again a matter clearly within the power of Congress, which this bill may or may not be. I do not join in the discussion of the constitutional issues here, from a sense of my own inadequacy and relying on the able arguments that have been made by the professsors who have spoken.

Our consistent position with regard to this issue springs from our commitment to the rule of law and our feeling as to the proper place of the Federal courts in our constitutional system. The issue really is not busing; it is not any of a number of things that may occasion dissatisfaction with particular decisions.

We are sure that the members of our association and of the Congress have many various positions on these substantive questions but the real issue, the only issue, is whether as a matter of policy and of constitutional permissibility, the Senate and the House are going to adopt a device whereby each time a decision of the Supreme Court or a lower Federal court offends a majority of both Houses of Congress, the jurisdiction of the Federal courts to hear that issue or to grant an effective remedy will be stripped away.

We do not believe that is a system the framers intended or one that we should strive to institute. We think that that is actually as clear in matters dealing with a remedy to grant what may be the only effective way of righting the constitutional wrong as it is with the removal of the jurisdiction to hear the constitutional question itself, perhaps more so under constitutional provisions.

Mr. Lincoln must be rolling over in his grave today. Everybody is quoting him, and I would like to quote him back in 1857 when he was discussing the decision which, perhaps more than many other things, led this country into the terrible War Between the States. Mr. Lincoln said, in 1857, "We think," said he of the Court, "its decisions on constitutional questions, when fully settled, should control not only the particular cases decided but the general policy of the country, subject only to be disturbed by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. We think the *Dred Scott* decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this"—direct, frontal, proper, and appropriate attack.

The amendment process established in article 5 of the Constitution, in our view, is the appropriate way to alter the Constitution and interpretations of it which the Supreme Court has rendered and to which, after thoughtful reconsideration, it adheres. We do not believe that the acknowledged absence of congressional power to bypass this amendment power by simple legislation can or should be filled by the expedient of couching what are legislative enactments in jurisdictional or remedial terms.

That, simply put, was the basis of the ABA's resolution, an amalgam of constitutional and policy concerns respecting the use of jurisdictional legislation to accomplish what cannot be accomplished substantively.

In S. 1647, of this Congress would adopt this bill, it would adopt certain rulings and findings which are contrary to rulings and findings made by the Supreme Court in particular decided cases. It says that the assignment and transportation of students to schools "is not reasonably related or necessary to the achievement of the compelling governmental interests in eliminating de jure purposeful segregation because such segregation can be eliminated without such assignment and transportation."

That is directly contrary to the conclusion of the Court in various decisions which have been cited here today. It is an attempt by this body to adopt by legislation rules of decision. I think the *Klein* case is the earliest case which shows that this Congress is not entrusted with power to do that in any case.

The bill further states that "assignment and transportation fails to account for data indicating that racial and ethnic imbalance in the schools is often the result of economic and sociological factors rather than past discrimination by public officials," but you must remember that the Supreme Court has said that it can only grant busing or any other remedy where there is de jure segregation. Therefore, this too is an attack on prior legal and factual conclusions of the Court in specific cases which were before them and on which evidence was taken.

Finally, the bill states in subsection 11 that busing has been undertaken without any constitutional basis or authority. The Supreme Court says to the contrary. Since the decision of John Marshall in *Marbury* v. *Madison,* the Supreme Court's decision on constitutional issues, I think, has stood as final.

We have doubts as to the constitutionality. You have power to determine the jurisdiction but we do not think your power is absolute. As I have said, I am not going to argue that but it seems to me that in all your powers that are given to you, you are subject to the provisions, for example, of the Bill of Rights and many other provisions which would prevent you from legislating in a given field in a given way that would infringe other articles of the Constitution. We think that principle may be applicable here.

As I said, I am going to leave the constitutional arguments to my able brothers, both sides. We think that the proposed legislation will have deleterious effects. We think that the Congress could consider that the shoe fits both feet. It is that kind of a shoe. The road runs both ways. Somebody else may be sitting here. Things may be done which you would object to. Would you want them done by what Justice Frankfurter referred to as a "leaden process" of constitutional amendment, or would you want them done by mere legislation? I think that the course prescribed has resulted in a stability which most governments have not had, for over 200 years of government by the people, for the people, and I think that it ought to continue.

In conclusion, we urge that judicial and legislative sanity argues for a restrained approach to these issues. Even if Congress feels that the Supreme Court or the federal system has adopted the wrong approach, the remedy is not jurisdictional manipulation, a constitutionally doubtful and politically dangerous policy.

Thank you very much, sir.

Senator East. Thank you, Mr. Meserve.

Mr. Eckhardt?

STATEMENT OF ROBERT C. ECKHARDT, ATTORNEY, WASHINGTON, D.C.

Mr. ECKHARDT. Mr. Chairman, thank you for permitting me to be here today.

As one who was a counsel in one of the early desegregation cases 5 years before the *Brown* decision that involved Mexican-American schools which were segregated in Texas at the time, I somewhat disagree with what you, Mr. Chairman, said the right protected was. At least, we did not conceive the right protected as the mere right to be treated the same as everyone else at the time.

The right that was attempted to be protected in a case called *Delgado* v. *Colorado School District* about 1949—which ultimately decided that the segregation of Mexican Americans in Texas in was unconstitutional on substantially the same grounds that *Brown* decided the question—the right that we sought to protect was the right to have equal opportunity of enjoying a public school education without regard to race.

If *Brown* children at that time had simply been permitted to go to whatever school they chose, as a practical matter they would still be segregated today. What happened as a result of that case was that all of the Mexican-American schools were, within about a year or two, absolutely disestablished. The result was integration.

Perhaps, as Professor Graglia has indicated in his statement at length, that should have been done in *Brown* instead of forcing the result in the South particularly of creating pockets and ghettos of blacks rather than the rather salt-and-pepper situation that existed before. However, I do not mean to argue the merits or the demerits of decisions like *Brown* and *Swann.*

I rather agree with the previous speaker that there has to be a stop to the debate as to what is the constitutional law of the country. I think the Supreme Court's major function is a validating function. In most cases that reach the Supreme Court testing congressional action, the court has upheld congressional action. In so doing, the argument ends at that point concerning constitutionality.

It would be hoped that the argument would also end at that point where the Court has held a particular action or a particular process as unconstitutional, yet I think we have heard a great deal here by those who favor this change by removal of jurisdictional authority, essentially an appeal to remove a part of a remedy believed to be necessary in order to enforce the right originally protected.

For instance, in Professor Graglia's statement he states that first, all rights are defined by their remedies. To alter any remedy is necessarily to alter the underlying right, yet of course he strongly disagrees with the remedy employed. I think that one must conclude that the remedy and the right are integrally related and the removal of a part of that remedy affects the constitutional right itself.

Now I was glad that Professor Walker brought us, I think, back to the question that we should be addressing here today, not the merits or the demerits of *Swann* and the other cases—those are decided—but the question of what can constitutionally be done about the question. I agree with him that the Congress has great power in adjusting the authority and the jurisdiction of the Federal courts. As a matter of fact, it probably has final and conclusive power in this respect, so long as in so doing it does not prevent any forum from considering a matter which is integrally related with the constitutional question.

I do, however, disagree with his conclusion that neither of these restrictions is incorporated in the proposed legislation and the ramifications of such changes as are now in question. I think, Professor, you must have had my statement to imagine the removal question that I have argued.

It seems to me that necessarily the rights of the State court to utilize the remedies specified here as prohibited to the Federal court, are destroyed by the virtue of the very strong language, the very strong application of section 1441 of title 28 of the United States Code. Now there is no question at all but that Congress, for instance, can take away the jurisdiction of the Federal court to issue a labor injunction. There is no dispute about that.

The question, though, as to whether or not Congress can take away from any tribunal the right to enforce relief which has been decided by the Supreme Court as a necessary or crucial relief in connection with that right is a very, very serious constitutional question. I think so long as 1441 remains without amendment—or indeed it should be put the other way, as long as this bill remains without amendment, because it is this bill that must be the standard of constitutionality—I think that what has happened is that Congress will have violated the constitutional mandate that "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and the treaties made which shall be made under their authority."

I think it is probably correct, almost certainly correct, that Justice Story went too far if he assumed that the whole judicial power of the United States should be at all times vested either in original or appellate form in some courts created under its authority, unless he meant by "created under its authority" those to which jurisdiction has been given or recognized by Congress.

However, if you read that statement just a little bit differently, I think it is the law and must be the law under section 2 of article 3, that is, that the judicial power shall cover all matters and shall extend to all cases in law and equity arising under this Constitution and the laws of the United States. That does not necessarily mean, and of course history has told us that it does not mean the cases that have come after the *Story* decision.

I think it shows clearly that Congress is not mandated to grant all Federal judicial power to Federal courts. However, I think it stands as a basic concept of the Constitution that that judicial power, particularly when it arises from the Constitution, must be available somewhere; that the whole power, the whole Federal power, must reside in a judicial body. It may not be reserved to a legislative body and Congress may not, because it decides that it will shift around that power between tribunals, effectively deny an integral part of a constitutional protection as decided by the U.S. Supreme Court.

Now that is the contention I make. I would like to go just a little further in describing the situation in 1441. The courts have original jurisdiction of all matters arising under the commerce clause in 28-1337, and have original jurisdiction in cases involving certain and most all civil rights questions under 1343; 1441 gives an absolute right of removal to any matter which could be originally entertained by a Federal court of the United States.

Now this point has been very clearly upheld in the labor cases, for instance, *Avco Corp.* v. *Aero 735,* and 390 U.S. 557. It was a case in which a State court in Tennessee sought to enjoin a union from striking the petitioners' plant. The union removed the case; remand was denied. The Federal court obviously did not have authority under Norris-LaGuardia to issue the injunction, so it dissolved the injunction and dismissed the case.

Even though the Federal court did not have the authority to grant the remedy, it removed the case from the State court which was the only court that could have exercised the remedy, and this is an absolute right to a defendant. I would hardly think that any defendant would fail to go to the Federal court to protect it from the State court's authority with such a situation available to the defendant's lawyers.

If that be the case, then, the right to utilize processes and remedies which the Supreme Court has decided are integral, necessary, and desirable to the enforcement of a constitutional right is denied in every court. If that be the case, and I think it clearly is as the bill is drawn, the bill is unconstitutional.

Senator **East**. Thank you, sir.

Mr. Flannery.

STATEMENT OF J. HAROLD FLANNERY, ATTORNEY, BOSTON, MASS.

Mr. **Flannery**. Mr. Chairman, I am comforted by the Biblical aphorism that the last shall be first and the first shall be last.

I have tried school desegregation cases for the U.S. Government during the 1960's and subsequently in the private sector, including the Government's first northern school case, well before *Swann.* I say that not to identify myself as the proper culprit in a dock but to perhaps explain or excuse my lack of an academic orientation comparable to that of some of my brethren. Perhaps I can add one perspective.

I think, Mr. Chairman, that we have to be very careful with the words we use. The chairman began the hearing talking about busing orders to achieve racial balance. As Professor Graglia has pointed out, that is kind of a buzz word. Technically, at least—although the professor might disagree with me—courts do not issue pupil reassignment orders to overcome racial imbalance or to accomplish racial balance.

The Supreme Court and the lower Federal courts faithfully, in my judgment, have adhered to the requirement that an intent to segregate illegally must be the predicate, must be the foundation for relief. There must be a violation as the predicate for a pupil reassignment order by transportation or by lesser expedients.

Therefore, it seems to me that we have to be quite careful in discussing these issues. The language which talks about orders to alter racial balance or to cause a different racial balance to come about may be confusing in that regard. If, that is, if the bill seeks merely to insure that there will be no such lower Federal court orders, I suggest respectfully that it is redundant and that the drafters might try a finer pen because, as observed in the Civil Rights Act of 1964, the Emergency School Aid Act, and the Education Amendments of 1972, the Congress has made its position clear.

I think a reading of *Swann* and *Keyes* and *Dayton I* confirms that the Supreme Court has made its concurrence clear but if that is not the issue, Mr. Chairman, if it is a frontal attack on the Constitution-based requirement of pupil reassignments as a last resort under some circumstances to overcome previous illegal segregation and its continuing present effects, I would remind the committee that that Constitution-based requirement was indicated in 1968 in the *Green* trilogy and articulated in 1971 in *Swann* and its companion cases but between *Brown* in 1954 and 1968 *Green,* a whole generation of schoolchildren had gone by, more than 12 years, and actual desegregation had not, as Professor Pollitt pointed out earlier, had not taken place.

Indeed, to expect individuals to bring about that change reflecting a reversal of 200 years of history was itself unfair, unpromising, and many would say discriminatory. Therefore, *Swann* became the Constitution-based requirement with respect to achieving a racially neutral, nonidentifiable school system, the obligation of public authorities, not just the patrons of the system in some instances.

If it is a direct challenge to the *Swann* remedy, Mr. Chairman, then I suggest that difficult problems are raised. I will not reiterate them here. I think to try to do indirectly by jurisdictional means what one cannot do directly, that is to deny or burden a Constitution-based right, is problematical. *McCardle, Klein, Yerger, Battaglia* in the second circuit, these have been canvassed by academics more knowledgeable than I.

I would like to bring to the committee's attention a forthcoming article in the October 8 Harvard Civil Rights-Civil Liberties Law Review by Professor Laurence Tribe, in which these issues are thoroughly canvassed. I note that there is a mechanism popularly by which the States can change, can amend Constitution-based remedies. The 11th amendment is an example of that, which prohibited suits by citizens of one State against another State; the 14th amendment which reversed *Scott* v. *Sanford;* the 16th amendment which addressed the Federal income tax which had previously been declared unconstitutional—those amendments addressed and changed not in a parliamentary, popular majoritarian way but as the Constitution prescribes, they changed Constitution-based decisions.

However, I think the courts, Mr. Chairman, will say of this legislation, as courts so often do, "Let us find a way to hold it constitutional. Let us interpret it in a way that is constitutional." Now I suggest to the drafters that there are genuine problems because there will be periods, I suggest, of jurisdictional turmoil perhaps.

However, I point out that the jurisdiction of the State courts to order these remedies which have taken place is not impaired. Moreover, the jurisdiction of the U.S. Supreme Court to order these remedies when constitutionally required is not impaired by S. 1647.

Therefore, we may have the spectacle of the lower Federal courts sitting as masters or factfinding magistrates.

I query whether they can be rendered so impotent as to issue only largely advisory opinions. However, the remedy will still be available not only from the State courts but from the text of the legislation from the U.S. Supreme Court. I remind the chairman, as he is undoubtedly aware, it was the U.S. Supreme Court in the *Charlotte-Mecklenburg* case that overturned the court of appeals and reinstated the pupil desegregation order of Judge McMillan.

Therefore, I suggest there will be jurisdictional SNAFU's and some turmoil but there will be disappointed expectations among those who oppose pupil desegregation by busing or otherwise because the relief will continue to be available.

Further, Mr. Chairman, I think there may be in the text of the bill some unintended ironies. Senator Stennis, during the 1960's, used to criticize the courts on the grounds that they applied the Constitution to the South but not to the North. I think the reality is that the bulk of the school desegregation litigation—not entirely by any means—but its bulk in the South is behind us. The northern cases for the most part have come in the last decade following the Supreme Court's decision in the *Denver* case, *Keyes*.

Therefore, if this bill operates to impair or impede further desegration litigation, it appears to me that its relief in the North will be greater than its relief in the South. In that event, I think Senator Stennis' criticism will be sadly valid.

I would point out further an unintended anomaly. Other speakers have pointed out more eloquently than I that the Supreme Court has been not only the bulwark of the rights we are discussing today but I would respectfully remind the committee that in the steel seizure cases it was the courts, the Federal courts that said to President Truman the executive had sought to overreach its properly delegated authority.

In the impoundment cases in our own lifetime, when a President asserted the right to impound and to refuse to spend congressionally appropriated funds, it was the courts that held the executive in check. Indeed, when an executive resisted a Judiciary Committee subpena from the U.S. Congress it was the courts that overruled that executive resistance.

With respect to the findings, I find that section 3(a)(3) which has no predicate in the findings whatever, the faculty contract provision, that is aimed simply I assume at reversing the *Greenwood, Miss.* and *Leflore County* decisions which held that faculty contracts or local tenure arrangements would have to yield to constitutionally required faculty desegregation. Not only does that provision appear without a factual predicate in the legislation but it appears simply to seek to overrule Constitution-based decisions found to be inconvenient.

Lastly, Mr. Chairman, and I thank the Chair for its indulgence, I am not a social scientist. I am not an educator but it seems to me that the wisdom of only 10 years of desegregation contrasted with 200 to 300 years of enforced segregation and discrimination, the returns are beginning to come in on whether desegregation is a tragedy, as some would characterize it, or whether desegregation will redeem a long-overdue promise.

I understand the committee has heard from the principal investigator in the Vanderbilt study and I shall not labor those questions but I do suggest, Mr. Chairman, that some of the findings in my experience as an active litigator—in school desegregation cases in the Federal courts and in the State courts and on behalf of school boards, I should say, as well as on behalf of plaintiffs—some of the findings cannot be sustained by the record as it exists in litigation to date.

I thank you.

Senator EAST. Thank you, sir.

Gentlemen, I thank you all. I would like in the very few minutes that are remaining just to summarize a bit where at least I as one Senator feel we are on this. All of this has been very helpful to me, at least reinforcing the principal problems we have here on this bill.

As I said with the last panel and I feel on this one too—which at least underscores my own analysis of it—that the two basic problems we have are, one, the right remedy problem which I had noted earlier, and then secondly whether, one, we do have this sort of power and, two, if we do is it prudent and wise to exercise it?

On the first point I will not belabor it because I have already stated my position. I am not suggesting that that position has to be accepted ex cathedra or anything of that kind but I am, just as one person, resistant to the idea that again the right is to the racially balanced educational system or the right of the type, Mr. Eckhardt, that you have defined.

I agree we can all somewhat play this fine constitutional art of saying, "What I decide is the right is this and then hence all remedies essential or indispensable to the realization of that right cannot be denied." If I wanted to settle this issue, perhaps I would actually pursue that argument but I think you would argue more accurately that the right is, coming out of *Brown,* that the right as probably would be understood by the vast majority of Americans—not that that necessarily ipso facto makes it the correct right—is the right of Americans to be treated neutrally as regards race under the U.S. Constitution.

I suppose if one could state the right as accurately as one can state right in the very vague world of even rights, that it approaches that end rather than some idea of the constitutional right to some form or precise degree or proportion of integrated education.

If you accepted the latter rationale, then you would have to operate on the premise that children in Washington, D.C., in the District of Columbia who are in predominantly, overwhelmingly black institutions are being denied a fundamental constitutional right, or children living in Harlem, or Watts, or Atlanta or wherever you have an extensive black population. I noted in Atlanta that the position of the local NAACP in Atlanta, what they wanted—that was not their conception of a right—what they contended was needed was to make sure they were part of the power structure in the school board, administration, and otherwise.

In short, many Americans, black and white, I think would be very resistant—and I do not mean I speak for all of them, I am just suggesting—would be very resistant to the idea that the right is to some precise form of balance in a given institution, in this case the schools. The more fundamental right, the right that ought to be kept in the forefront—and if it is not I think there is tremendous mischief here, we are ultimately turning the kind of right you are talking about, defining it away—is the right to be treated equally under the Constitution, that racial considerations are neutral.

If that is the right, and I am saying it is—I do not mean to go on ad nauseam about it—but if that is the right then I am saying this remedy of busing ought to be eliminated because in effect it is eroding away a right, a right to be treated equally neutral. Even so, as I said earlier, if you concede that what you say is the right is the right, I would simply again fall back on my argument that there are many rights we have under the Constitution but it does not follow that every conceivable remedy that the mind of man might devise we are thereby entitled to.

As I noted with the earlier panel, the right to counsel, the right to free speech and press, these are very fundmental, absolute rights but certainly no one argues that every conceivable remedy that I might come up with that would maximize that right as I defined it and see it is thereby instantly guaranteed. For example, the right to freedom of the press does not mean the Government will fund me in the printing business. I do not mean to make light of the point but the right to counsel does not mean I am entitled to Edward Bennett Williams.

That is, for any fundamental right there are limitations in terms of remedies, and I do not buy the argument that the only remedy to the realization—assuming it is the right of integrated education, of racially balanced education—is busing. It has been suggested earlier there are other remedies for it, magnet schools, inducements, and so on. There are other ways to achieve that end.

Therefore, I would agree if this is the exclusive remedy and that is the right—neither of which I am conceding—but if that were the case then I would be inclined to say, "Gentlemen, I think you have made your case. It would inappropriate to take away the jurisdiction of the Court."

Now, the second thing that troubles me is the idea that Congress should make policy only on the basis of testimony from experts on the social sciences.

This is very good and it is very helpful but the one dimension that they do not, perhaps, fully grasp is how do people out in the elected political arena grapple with this kind of problem. It is a very serious problem because I can report to you and anybody who serves on local school boards can report to you that the position that is taken on this matter of mandated court-ordered busing does not enjoy the support of the American people. It does not enjoy it in terms of what the polls reflect, black or white, negative on it.

I think it also accounts for the fact the polls show the judiciary is not held in particularly high regard. You can get a very rousing response on the political circuit by condemning the judicial tyranny of the U.S. Supreme Court or the other Federal courts. I am not encouraging demagoguery. I am simply stating to you a fundamental political fact of life in America today, that there are limits in representative democratic society as to how far you can coerce the populace to go in a policy area.

Those of us out on the firing line cannot really afford the luxury of simply defining all of that away, simply saying our figures show this, our constitutional analysis shows that. You are back to this very delicate problem of how you resolve major policy questions of the American political experience, and I am still more comfortable in the long run with the legislative branch making those more fundamental decisions.

Professor Graglia has pointed out, the 1964 Civil Rights Act, probably the most successful piece of civil rights legislation in the United States—titles 2 and 7 come to mind—why has that been effective? It was a consensus. It was debated out in the legislative chamber in the deliberative process and represented a consensus of the American people. The resistance to that was fairly minimal, and has been accepted because it came from the legislative chamber. It did not come from the bureaucracy; it did not come from the courts; it did not come from elitists in the academy. It came from a building of consensus out among the people in the democratic society.

That is where we come from. That is the constituency that we have and we neglect it at our peril, not only in terms of political survival—that is not the main point—but in terms of democratic political theory. How far can we go in neglecting that? Who leads the people in a direction they are totally opposed to? I mean, there are limits to that. I am simply throwing out that there are limits, are there not, to how far you can coerce people in a free society.

However noble the intentions, however noble the alleged cause, however magnificent the alleged right involved is, you find as an elected leader you simply run up against the practical problem of how far you coerce people in a free society.

Now on our power under the Constitution, it seems to me all concede we have it. Some agree that it would just be imprudent to use it. However, the trouble I find is that where we have to deal with these difficult problems that the Supreme Court has presented to us. One example is *Roe* v. *Wade* which many constitutional scholars say is poor constitutional law. We get into this area of these delicate policy questions, and the Supreme Court has dumped these on us. The lower Federal courts have dumped them on us.

How do we get out from under it? We keep getting advisors in here, maybe sometimes from the Justice Department, sometimes from the academy and all over, who say "No, you cannot do this, you cannot do that." I find them saying Congress is impotent.

We pass a law, the 1964 Civil Rights Act, which expressly indicates in 42 U.S.C. 2000c(b) that it disapproves of busing for racial balance and Congress is ignored by the courts. What we are really left with is the amending process, I guess, but that is crude. It is hard, it is difficult, it is dogmatic. It totally alters the nature of democratic representative government, does it not?

All of a sudden to correct judicial abuses, one needs a two-thirds vote on a constitutional amendment and then it is out to the States for ratification and Congress is left with little power. We have a new system of Government. The Supreme Court by edict makes major policy decisions and then Congress tries to alter them through the constitutional amendment process. Reflect on that;

think it through. That is a very fundamental change in the U.S. Constitution's system of government.

I feel that at least what we are trying to do here by removing a narrow part of the court's jurisdiction is very consistent with the grant of power that we have in the Constitution. I am resistant to the idea of those who conjure up some great chamber of horrors: They say, "If we do this, we will do it here, we will do it there. We will be off and running and we will do it all over. Congress will emasculate the courts and upend it, and what will we do?"

It is the old story, and I would probably do the same thing if I were on the other side of this as an attorney arguing that turf and defending the status quo, which people are doing. However, I think this is a prudent Congress, it is a prudent legislative branch. It reflects the American people. The American people are prudent on this. We are going to go no further than they want to go.

I think they are weary of busing; they want to stop it but I do not think they want to emasculate the courts. I do not think there is any pretense they will do that.

What we are being told is, "Yes, you have the power to do what you would want to do but frankly we can conceive of no situation where you ever ought to exercise it because then you would set a precedent, and then terrible things would follow."

I think it reflects adversely on the American people. I think it reflects adversely on their representatives. I think it reflects adversely on us. I like to feel that we are not wild, radical, imprudent people. I do not think we are any more radical or wild than some of the edicts we get from lower Federal courts or Federal bureaucrats or other elitists who sit at the center and attempt to organize and direct and control and run people's lives so casually.

Well, I have wandered on too long. Maybe, one, I have helped clarify a little bit of my own thinking. Maybe you still think I have not moved in the right direction but maybe I have given you a little insight as to the frustration a Senator has or someone in the representative democratic arena has, because what we are asked to accept is rejected out there, and when we attempt to take some sort of corrective action, however modest, we are advised, "No you cannot do that. Congress really has to go back and report to its constituents that it is impotent. The U.S. Constitution really offers us no practical way to deal with that. The answer: Live with it."

Well, I do not know but if this sort of thing continues indefinitely, I suspect one day somewhere the American people will elect a Senate and a Congress that will do something about it. If this Senate and this Congress chooses not to do it for whatever reasons—and I greatly respect them, I am a Member of it—if they decline to take any kind of practical, reasonable effort to resolve it, one day I suspect you will have a Congress that will do it, that will be assertive enough, if that is the right word, to do this or to do something similar to it, to put an end to something on which there is such a wide-based, broad acknowledgment that it is a bad practice.

Court-ordered busing for racial balance is not the litmus test of a sound civil rights policy. We are resistant to the idea that there is something racist about being opposed to it. One can believe in a sound, fair, equitable civil rights policy, for blacks and whites, and still oppose busing of the type that has been going on in this country in recent years, contrary to the community experience.

I think I speak on that point right there probably representing the majority opinion in this country, black and white, more than any other single position I have heard. Not that they have asked me to speak for them, just in my own gut feeling as a man out in the political arena, I suspect I do. If we took a poll, they would say, "That is right. We do not believe that is the litmus test. Busing has been abused and we ought to find some way to curtail it and rein it in."

However, we do agree with the goals of racial neutrality, fairness, equitableness, and all remedies that are reasonably related to those goals ought to remain intact, and the lower Federal courts ought to retain the jurisdiction to enforce them. That is how far we want to go but no further.

You have been extremely helpful, and I thank you. I do not know where this will come out. It may well be that the position of the dissenters here—and we also heard from them yesterday—will prevail. I do not know. It depends on what Members of the Senate and the Congress decide to do. I think right now it is a very big question mark; it is very much up in the air whether any kind of definitive action will be taken.

Mr. Meserve.

Mr. MESERVE. Senator, I realize that I have overrun my time——

Senator EAST. Well, I overran mine, so don't feel badly.

Mr. MESERVE. And I appreciate very much your courtesy but I do not want to leave this in the light that we think that the Senate or the Congress are emasculated or that there are any restrictions on them that are not provided by the Constitution of the United States.

The constitutional system has lasted for 200 years and the doctrine of judicial supremacy in areas affecting constitutional law has existed for that period of time. On the whole, I think, as an American citizen who has seen a reasonable part of those 200 years, I think it works pretty well.

I think, for example, that if you went to a great majority of the people and they said that Jones down on the corner was speaking in favor of a Communist system of government and we ought to be able to do something about that, they would think you could do something about that but the Constitution of the United States says you cannot, so long as he confines himself to speech. It protects him against a majority.

Who knows? I do not say he is right. I do not think he is right but 100 years from now he may be right. I do not know and I suggest to you, Senator, that this system has worked pretty well.

Finally, I do not want to leave with you the assumption that we agree that this legislation is constitutional. I passed that issue and left it to my brothers. I think this legislation is of doubtful constitutionality. I want to emphasize that.

Thank you.

Senator EAST. Yes?

Mr. ECKHARDT. May I join in that statement? I do not agree with the Senator. I feel that it might possibly be made constitititional but I think that is even doubtful. If a basic right under the Constitution and its related remedies are removed from any Federal court, there is a serious question in my mind as to whether or not the very, very difficult and diffuse remedy of trying such a question in every State court in the land, with no real way to reconcile the decisions, meets with constitutional approval.

Senator **East**. Well, as I say, we have had a fundamental disagreement over what is the right, and then, is this remedy essential to that right. I think this discussion has been useful to get that in focus for us. We obviously have not been able to resolve it fully to each other's satisfaction.

Mr. **Eckhardt**. Mr. Chairman, may I respectfully say, the right is what the Supreme Court says the right is.

Senator **East**. Perhaps in 1857 you would say we know the rights defined by the Supreme Court in *Dred Scott* and the rights defined by the Supreme Court in *Plessy* v. *Ferguson.* I am not faulting you but you are somewhat defending the political turf, you like it the way it is. Actually you recognize, don't you, that the Supreme Court is only one part of the entire fabric of the policymaking process in this country. If one likes a Supreme Court holding, one rushes to its defense by speaking of its sanctity and "the Constitution is what the Supreme Court said."

However, I suspect a distinguished man of your values and convictions would not have so said with *Plessy* v. *Ferguson* or with *Dred Scott.* You would have said as Lincoln said, "Gentlemen, let's see if we can't change this." Therefore, we all reserve the right to question the finality. The Supreme Court speaks with authority but not ex cathedra, in terms of the American political tradition and the U.S. Constitution.

Therefore, I do not feel that heresy is afoot here if we attempt to challenge a Supreme Court holding nor do I think that the framers of the Constitution would be appalled at that. I think they would rather be somewhat surprised at the degree to which we have been conditioned in the American experience today to accept the edict of the Court without questioning. We are so accustomed to this incredible power that when someone suggests we avail ourselves of a clear remedy in the Constitution, everybody says, "Oh, hush, you wouldn't think of doing that," as though you were challenging the king.

I am suggesting the Jeffersonian as well as the Hamiltonian idea was to greatly restrict and confine the power of the courts, as I noted earlier in terms of the checks and balances on the courts. It is our age that has become so subservient to Court edict but it was not true in the founding period, and I think it would appall Jefferson and others of the great founding period that we are so subservient to Court edict, that as a basic fundamental tendency of constitutional law we simply say today, "The Constitution is whatever the Court said," so that ends the argument.

Mr. **Eckhardt**. Mr. Chairman?

Senator **East**. Yes?

Mr. **Eckhardt**. In the midthirties there was no more staunch New Dealer than myself, and there was no question but that the Congress could add to the Supreme Court and change its decisions, with President Roosevelt in power at the time. However, I was opposed to it and I would be opposed to this now regardless of how I might stand on the question of segregation or desegregation.

Senator EAST. However, I would not call those two things on point. First of all, we have the very express provision here of jurisdiction, and it is a rather narrow thing here we are drawing. In packing the Court one is talking about clearly packing the Court with Justices with a whole range of values to totally upend the whole complexion of the Court. I think President Roosevelt clearly went beyond the pale of prudence and good judgment there. What we are doing is an infinitely more modest thing of carving out a slender part of the jurisdiction of the lower Federal courts—which clearly we have the power to do—to deal with a specific problem.

Again, I am uncomfortable with the idea that we can be thrown into the same bag with the Court-packing plan of 1937—a good rhetorical debate point but I would submit upon close examination it is strained and forced, and carries us beyond the pale of the modest point we are making.

Mr. ECKHARDT. Suppose we should make the more modest suggestion that we should have provided that a question could not be brought up in a Federal court which raised a substantive due process. Would you think that that would be a desirable way to change what the Court was determining with respect to the 14th amendment?

Senator EAST. Now, wait. Please restate that.

Mr. ECKHARDT. Suppose we at that time had decided that, along with Holmes and Brandeis and others, that the 14th amendment only protects procedural due process which, of course, is now the law. I think that probably the Court went a step further beyond its bounds in applying substantive due process even than any recent court has done. Would you feel that we should at that time have provided that no court, Federal court, should have authority to decide a question in which the question that was raised was substantive due process, State law?

Senator EAST. Well, I would suggest that perhaps it is not parallel either. Do you mean you are withdrawing the jurisdiction to hear cases to hear substantive due process?

Well, there now I think one does face up to the problem of dealing with the potential question of substantive rights under the Constitution, I mean, similar to withdrawing the jurisdiction of the Court to hear cases involving free speech or press, and so forth. I am deeply troubled with that, now.

However, when you are talking about a very narrow proposition here, what I am calling this slender piece of jurisdiction dealing with a particular remedy that supposedly is supposed to enforce a right—which I am contending does not exist anyway, in fact, the right is the other way around, that, to me—is a mischief that we are dealing with here.

If we were proposing to withdraw the jurisdiction of the lower Federal courts or, let's say, the appellate jurisdiction of the U.S. Supreme Court, to deal with all matters involving race relations in the United States today, I would not be on the parapets defending that because there you are getting into the whole question of fundamental, substantive rights. That, to me, would be radical, extreme, and I would probably be joining the opposition as far as a major assault upon the Constitution.

However, we are not doing that. As I have been contending, we are modest, moderate fellows. In fact, we are not engaged in a wholesale frontal assault upon fundamental rights or the Constitution.

Professor Graglia?

Professor **Graglia**. The position taken by Mr. Meserve and Representative Eckhardt really boils down to that the Court not only is the final word—that the Constitution is what the Court says it is—but that is the way it is supposed to be. Now when Senator Baucus said, "Isn't that, as a practical matter, true?"—that the Court has the final word—the answer is, 'Yes, I am afraid that as a practical matter, unfortunately, that is true."

However, there is general agreement that it should not be true, that this should still be a Government by the legislature, a system of self-government through elected representatives. What that argument amounts to, the ABA's argument and Representative Eckhardt's argument, is that the legislature should let the Constitution be what the Court says it is.

Now, Representative Eckhardt wrote a book with Prof. Charles Black, of almost equal constitutional ability as Congressman Eckhardt, and it is interesting that Black's most recent book makes the point—you might be interested in seeing it, Representative Eckhardt—and Professor Black is perhaps our leading defender of judicial activism, but he makes the point that the only way you can possibly justify letting courts have the power that they have in our system is if it is entirely clear that Congress has full power to remove jurisdiction as to all matters.

It seems to me there is no other possible justification. We are letting the courts decide basic questions of social policy, and what Black is saying is, "Well, we must like it. That must be all right, that must be consonant with democracy, or the Legislature, the Congress, would take away the courts' jurisdiction, which Congress clearly has the power to do.

Now here we have an area of judicial activity that I think is indefensible. If ever there is a place for Congress to assert itself, this is the place.

Thank you.

Senator **East**. Well, gentlemen, I wish to thank you all again. We have run over our time a bit but you have been extremely helpful. I have enjoyed it. I would remind you we have been blessed. We were not interrupted with these crazy rollcall votes which have us running around here from time to time and interrupting.

I think it has been a very helpful discussion to me and I know it was to Senator Baucus. We appreciate your coming and being a part of our effort here. We would like to leave the record open for additional written questions that other members of the panel might submit to you, which at your leisure you could answer and return. We are not asking you to do anything today but if you would please be willing to be available for written questions that other members of this subcommittee might have.

Again, I thank you for coming. If one of you has a final parting thrust I shall let you have the last word, unless perhaps you have said your piece and you are ready to retire.

Thank you very much.

[The prepared statements of Messrs. Graglia, Walker, Meserve (with resolution), Eckhardt, and Flannery follow:]

PREPARED STATEMENT OF PROF. LINO A. GRAGLIA

The history of court-ordered racial busing and attempts by Congress to prevent or limit it is now a long and sorry one. It is a history of a judicial misfeasance - for example, blatent misinterpretation and misapplication of acts of Congress - and of apparent congressional impotence in the face of this misfeasance. A brief review of this history and of the origin and theory of court-ordered busing will aid in understanding our present position and in considering possible further steps by Congress to end busing.

The Origin of Busing; Congress' Anti-Busing Efforts

The story begins of course with the Supreme Court's 1954 decision in Brown v. Board of Education, 347 U.S. 483, holding, for the first time, that state laws requiring school racial segregation are unconstitutional. Everything done by the courts since Brown in the area of race and the schools has been done in the name of enforcing Brown. We are here today, however, only because the courts have apparently long forgotten the fundamental constitutional principle established by Brown, the principle that assured its acceptance by Congress and the American people. "The fundamental principle," of Brown, the Court said in Brown II, 349 U.S. 295, 298 (1955), is that "racial discrimination in public education is unconstitutional." Indeed. the Court soon made clear, in a series of decisions invalidating segregation laws generally by merely citing Brown, the fundamental principle is that all racial discrimination by government is unconstitutional, not just racial discrimination in education. See, e.g., Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Gayle v. Browder, 342 U.S. 902 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses). Opposition to court-ordered racial busing rests, of course, not on any disagreement with Brown, but on insistance that such busing violates the fundamental principle of Brown that all racial discrimination by government is unconstitutional and that, therefore, children must be assigned to schools without regard to race.

Although it declared state segregation laws unconstitutional in Brown, the Court, in an unprecedented and legally unwarranted action, did not require that the practice of segregation actually be ended at once or even within any specified time. The Court first put the question off for a year and then decreed only that segregation was to be ended "as soon as practicable" and "with all deliberate speed." Brown II, supra. After thus leaving school authorities and the lower courts with almost no guidance as to what was in fact required, the Court in effect withdrew from the area for almost a decade by refusing to review lower court decisions. The Brown decision was made effective and segregation actually brought to an end, not as a result of further action by the Court, but by reason of Congress' enactment of the 1964 Civil Rights Act. By that Act, Congress in effect endorsed the fundamental principle of Brown and adopted it as a matter of national legislative policy. What the courts have done with the 1964 Act, however, can only be described as scandalous; an Act intended to end all racial discrimination by government was converted to the means of compelling racial discrimination by government.

Title VI of the 1964 Act prohibits racial discrimination in all activities or programs receiving federal financial assistance, including all or nearly all public school systems. In addition, Title IV authorizes the attorney general of the United States to bring suits to compel desegregation. Opposition to the Act in Congress, primarily by representatives of the South, was intense, but not on the ground that racial discrimination in schools or elsewhere was defensible and should not be prohibited. Opposition was, instead, based on the belief that, regardless of what Congress intended and said, the Act would somehow become a means of requiring racial discrimination and, in particular, compulsory school racial integration and busing to achieve school racial balance. The proponents of the Act were incredulous and took this argument as either a ruse concealing a desire to retain racial discrimination or as a symptom of paranoia. They offered and gave the opponents of the Act every possible assurance that their fears were unfounded.

Thus, Section 401 of the Act carefully and clearly states that "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race." To make its purpose doublely certain, Congress restated this negatively: "'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." Section 407 repeats again: "Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance." Finally, Section 410 states still again: "Nothing in this title shall prohibit classification and assignment for reasons other than race." As Senator Humphrey, the floor manager of the bill, assured opponents of the Act, "One cannot get anything more definite than that." The fears of the opponents, he said, were nothing more than "bogeymen and hobgoblins." Senator Javits stated that any government official who tried to use the Act to require racial balance would be "making a fool of himself" and would give opponents "an open and shut case."

Senator Humphrey gave opponents of the Act the ultimate assurance that it could not possibly lead to compulsary integration or a requirement of racial balance and busing. Such use of the Act was impossible, he said, even if Congress had not explicitly and repeatedly prohibited it, because it would plainly be unconstitutional:

> [W]hile the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. *

The fears of the opponents of the 1964 Act soon proved, of course, to be only too well-founded. In 1966 the United States Court of Appeals for the Fifth Circuit, sitting en banc, held that there is no difference between requiring desegregation and compelling integration and that the Act authorized the Office of Education of HEW to require assignment by race in order to increase school racial integration or balance. United States v. Jefferson County Board of Education, 372 F.2d 836, 380 F.2d 385. Despite the enormous import of this decision, rewriting both the Act and the Constitution, the Supreme Court declined to review it, and two years later in effect affirmed and adopted it in Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

Although Green is little known, it was perhaps an even more momentous decision than Brown, the beginning of a second and much more ambitious and questionable revolution on questions of race and the source of all current problems of race and the schools. Purporting to do no more than enforce Brown, the Court in fact converted Brown's prohibition of segregation and all racial discrimination by government into a requirement of integration and the practice of racial discrimination

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*For citations and fuller discussion of the legislative history of the 1964 Act, see Graglia, Disaster by Decree, Ch. 4 (1976).

by government. The Court said that the requirement continued to be only "desegregation," as in Brown, but what the Court actually did showed that "desegregation" was given a new and very different meaning. What it did was hold that the operation of the school system was unconstitutional although, as the parties agreed, the practice of racial discrimination had ended; unconstitutionality was found, instead, in the fact that the school system had not achieved what the Court considered to be a sufficient degree of racial integration. "Desegregation" now meant, not assignment without regard to race, as in the 1964 Act, but compulsory assignment according to race to attempt to produce greater racial mixing. Incredibly, the Court cited the 1964 Act as supporting this result.

It was soon discovered that a requirement of thoroughly integrated or racially balanced schools could not be met, especially in urban areas, except by prohibiting the assignment of children to their neighborhood schools and requiring their assignment to distant schools because of their race. Racially balanced schools could not be produced in racially imbalanced neighborhoods except by transporting children, and thus was born the busing requirement. Busing, as its defenders often point out, is merely a tool, and usually an indispensible tool, of compulsory integration; it is compulsory integration carried to its logical, though insane, conclusion.

Compulsory integration was in fact carried to this conclusion by the Supreme Court for the first time in Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971). Almost everything about the Swann decision is extraordinary - for example, the district court, the court of appeals, and the Supreme Court each required busing on a different theory; the Supreme Court's explanation for its decision and the actual facts of the case bear almost no relation to one another; findings attributed to the lower courts by the Supreme Court are not to be found in the lower court opinions. But perhaps most remarkable - and reprehensible - is the Court's reconciliation of compulsory racial assignment and busing for racial balance with Title IV of the 1964 Civil Rights Act.

Without the least support in the Act or its legislative history, the Court in Swann simply announced that the 1964 Act's definition of "desegregation" as assignment without regard to race and its disallowance of assignment and busing for racial balance were not meant to apply to the South, but only to the school districts of the North that did not have unconstitutional segregation! Thus every provision in the Act insisted upon by representatives of the South and every assurance given them by the proponents of the Act was rended a nullity; precisely what Congress had sought so carefully and emphatically to prevent, the Supreme Court nonetheless required.

As Senator Sam Ervin has indignantly but accurately pointed out "Section 401(b)...says in about as plain words as can be found in the English language" that assignments to school were to be non-racial. Congress

> could not have found simpler words to express that concept. Yet, in the Swann case the Supreme Court ignored that definition and said in effect that 'desegregation' requires that school boards should take into consideration matters of race...in making assignments.
>
> "But then, the Congress decided to take no chances with the courts, so it put in something else that even a judge ought to be able to understand. It not only defined 'desegregation,' affirmatively, but also defined what 'desegregation' is not. The Supreme Court adopted exactly the opposite interpretation of the meaning of the word 'desegregation.' It said, in effect, in the Swann case that 'desegregation' shall mean the assignment of students to public schools in order to overcome racial imbalance...
>
> "There is not a word in this whole title that indicates any intention of Congress to regulate 'de facto segregation' that is based upon residence. Yet, the Supreme Court nullified this act of Congress by holding that Congress was a bunch of legislative fools and that Congress had attempted to regulate 'de facto segregation' instead of 'de jure segregation.'"

Busing of School Children, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 93d Cong., 2d sess., 42-43 (1974).

This behaviour is possible only because the Supreme Court is in fact supreme, subject to no review, and has been allowed to become supreme as a legislature as well as a court. The question before the Congress and the country - surely the most important question regarding our system of government today - is whether Congress is willing and able to reassert legislative supremacy.

The courts' treatment of Congress' further attempts to limit busing has been no more respectful. In the Education Amendments of 1972, 86 Stat. 322, Congress provided that any order requiring transportation "for the purpose of achieving a balance among students with regard to race" should be stayed pending all appeals. In Drummond v. Acree, 409 U.S. 1228 (1972), Justice Powell ruled that this statute had no application to the busing order involved in the case, because like all court-ordered busing, it was not for "racial balance" but only for "desegregation." The result was to give the statute no more effect than if it had never been passed.

In the Education Amendments of 1972 Congress also futilely attempted to correct the Supreme Court's mutilation of the 1964 Act in Swann by insisting that Title IV of the Act was indeed meant to apply in the South as well as elsewhere. The Act provides that Title IV's denial of power to require busing for racial balance

> shall apply to all public school pupils and to every public school system, public school and public school board, as defined by Title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

This pathetic provision, more the whimper of a supplicant than the voice of the elected representatives of a sovereign people, has of course been simply ignored by the courts.

Congress' most extensive effort to limit court-ordered busing is the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 et seq. Congress made findings as to the costs and harms of busing, declared that "the neighborhood school is the appropriate basis for determining school assignments," and attempted to place severe restrictions on court-ordered busing. However, at the insistence of defenders of busing, the act also provides that its provisions "are not intended to modify or diminish the authority" of federal courts to enforce the Constitution, with the result that this legislation, too, has had no more effect than if it had never been passed.

There can be no real doubt that Congress has the power to end court-ordered busing if Congress has sufficient determination, but this history should make clear that the task is not an easy one. Half-hearted measures may be worse than none, serving only to make Congress appear futile and impotent.

What Congress Can Do

The difficulty with a discussion of congressional power to correct the errors of our judges is, of course, that Congress has long allowed itself to be placed in a "Catch-22" position. The courts have little hesitancy in undoing the work of Congress with which they disagree, but Congress can curb the courts only when and to the extent the courts agree that they have properly been curbed. In addition, Congress unfortunately shows a deference to the courts, particularly the Supreme Court, grossly disproportionate to the deference the courts accord Congress. The basis for deference to courts is absent when the judges do not confine themselves the performance of the judicial function.

As long as Congress must abide by the Constitution and "the Constitution," as Charles Evans Hughes pointed out, "is what the judges say it is," Congress must abide by the judges. That is the essence of what our system of government has largely come down to, government by unelected life-tenured judges, and the dangers and ill-effects of this system are in no way better illustrated than by the busing quandary.

To advise Congress on what it can constitutionally do is simply to attempt to predict what the courts - in the end, a majority of the nine lawyers making up the Supreme Court - will permit Congress to do, and where the congressional objective is to alter one of the most misguided but most ardently pursued policies of the courts, prediction becomes particularly chancy.

Congress can of course seek to limit the courts by constitutional amendment, and most thoroughly, by an amendment simply abolishing judicial review - but even here, as experience with the Eleventh Amendment shows, the courts have the last word. Constitutional amendments are undesirable when their effect is to limit democracy, to take policy-making power out of the hands of the people. But, by the same token, they are generally highly desirable, pro-democratic, when their effect is only to limit the power of judges and return policy making power to the people. Congressman Mottl of Ohio has proposed a constitutional amendment, which I had a hand in drafting, that would do no more than deny federal judges the power to require school assignments according to race. I cannot too strongly urge the adoption of this amendment, regardless of the outcome of our efforts to limit court-ordered busing by legislation. Its adoption would be enormously beneficial to our political and social health, beyond the benefits of ending busing, because it would constitute a much-needed reassertion that policy-making power on the fundamental issues of American life and society does not ultimately lie in the courts.

Legislative authority of Congress relevant to the busing issue includes Congress' authority to control the jurisdiction of federal courts under Article III, Sections 1 and 2, and its authority to enforce the Fourteenth Amendment by "appropriate legislation" under Section 5 of that Amendment. Congress' Article III power provides the much more frequently used and apparently more certain route. It is entirely certain that Congress, having created the lower federal courts, is equally free completely to abolish them, and Congress could limit the Supreme Court to its constitutionally granted original jurisdiction.

Proponents of judicial activism have suggested in recent years that Congress can not so limit the jurisdiction of federal courts as to deprive them of the ability to perform their "essential constitutional functions," but this is untenable. Aside from the Supreme Court's original jurisdiction, the Constitution does not assign any "essential function" to the federal courts. The Constitution, of course, nowhere mentions judicial review; it certainly does not assign to federal courts a general supervisory power other institutions of government. The task of the federal courts, as of other courts, is only to decide cases within their granted jurisdiction; where jurisdiction does not exist, they have no function.*

To argue that Congress cannot control the jurisdiction of federal courts is to argue that the will of the people may not prevail over the will of the judge short a revolution; for judges to attempt to exercise a jurisdiction they have not granted would itself be revolutionary. As even one of our most prominent defenders of judicial activism, Professor Charles Black, recently stated in his Holmes Lecture at Harvard, congressional control of federal court jurisdiction sufficient to reject or overturn unacceptable judicial policy-making is essential to any attempt to reconcile the power of our courts with self-government. Black, Decision According to Law (1981).

It is also clear that Congress could simply remove from federal courts all jurisdiction over school cases. There is much that could be said in favor of this if it were politically feasible. The result would be simply to return the operation of school systems to school authorities, where it rested not many years ago. The schools would undoubtedly be better run, and the federal courts would be relieved of a very substantial burden. On the one hand, there would be no danger of a return to racial discrimination, because no school district wants segregation, because the 1964 Civil Rights Act and state courts would in any event prevent it, and because Congress could, of course, return school case jurisdiction to the federal courts if need be.

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*As Professor Herbert Wechsler put it:

> Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of the government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jursidiction and in doing so must give effect to the supreme law of the land.

Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1006 (1965).

On the other hand, the absence of federal court jurisdiction would leave school districts free to take voluntary steps to increase integration if they so chose. Many actions by school officials have racial effects, and it is not possible to ignore or be unaware of these effects. When one school decision would favor integration and another otherwise equally suitable decision would disfavor it, school officials should be free to favor integration without the threat of federal litigation.

Congress can stop busing without removing federal court jurisdiction over all school cases if Congress can remove jurisdiction over just school "segregation" cases. Professor Charles Black has stated that Congress can validly "abolish the jurisdiction of the federal courts over school segregation cases." Black, Decision According to Law, p. 19 (1981).*

But can Congress deny the federal courts jurisdiction to order busing without denying jurisdiction over all school cases or even just segregation cases? The basic problem, as noted above, is not court-ordered busing as such but court-ordered racial integration or balance, that is, court-ordered racial assignments and, in particular, court-ordered racial exclusion of children from their neighborhood schools. A prohibition of court-ordered busing would have little value if judges could still order the exclusion of students from their neighborhood schools, the closing of schools, and the gerrymandering of school zones on racial grounds, leaving the resulting transportation problems to be solved by the students, their parents, or school authorities. No busing would be necessary, after all, if the students would just move close enough to their court-assigned schools. The need, therefore, is to remove federal court jurisdiction to order that students be racially assigned to, or racially excluded from, schools. On the basis both of principle and authority, it seems clear that Congress' Article III authority to define federal court jurisdiction is ample for this purpose. It also seems that Congress' Fourteenth Amendment legislative authority provides additional grounds for a statutory prohibition of court-ordered racial assignment.

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* Congress could not, however, he adds, "first direct the courts to take jurisdiction over such cases, and then direct the courts to decide that segregation did not violate the Constitution." Ibid.

The theory of busing

An understanding of the theory or rationale of court-ordered busing for school racial balance is necessary to consideration of Congress' Fourteenth Amendment legislative authority to end busing. It is not strictly necessary to consideration of Congress' Article III authority; Congress can remove federal court jurisdiction to order busing (racial assignments) regardless of the courts' rationale for busing. Because of the right-remedy distinction sometimes asserted in connection with Congress' Article III authority, however, a discussion of the theory of busing may be helpful before discussing that authority.

The law of busing for racial balance is so confused, illogical, and basically fraudulent that clear discussion is extremely difficult. It is necessary to distinguish at almost every point between what the courts say they do and what they actually do, between what the constitutional requirement is in theory and what it is in fact, two very different things. Courts order busing in order to increase school racial integration or balance, that is, to produce a higher degree of actual racial mixing in the schools than results from simply prohibiting the practice of segregation, racial assignment to separate the races. But, the Supreme Court uniformly and consistently asserts, racially integrated or balanced schools are not required as such, for their own sake; there is, the Court repeatedly insists, no constitutional right to attend an integrated or racially balanced school. (The lower courts, it is true are frequently confused, seeing that what the Supreme Court says and what it does are different things.)

Thus, the Supreme Court said in Swann, the first busing case, that there is no constitutional right to "any particular degree of racial balance or mixing" and that absent an independent constitutional violation a federal court could not require "a prescribed ratio of Negro to white students." As the Court stated in Dayton Board of Education v. Brinkman, 433 U.S. 408 (1977), many of a school district's schools may be "predominately white or predominately black. This fact without more, of course, does not offend the Constitution."

It is not mere racial imbalance that offends the Constitution, the theory is, but only "de jure" segregation, and the courts compel integration or racial balance only as necessary to enforce Brown's prohibition of "de jure" segregation by requiring "desegregation."

But if the courts are, as they claim, merely enforcing Brown's prohibition of segregation, i.e., racial discrimination, why is it necessary to require racial discrimination, albeit now to mix rather than to separate the races? The "remedy" for racial discrimination, it would seem, is to prohibit racial discrimination. Given that segregation was constitutional, as Justice Frankfurter has pointed out, up to the day before Brown was decided, the Court having repeatedly so held, there certainly can be no question of imposing a punishment or other legal liability for the practice of segregation. As the ex post facto clause of the Constitution illustrates, it is generally considered improper to impose legal liability for acts not illegal when done. Is not the whole notion of requiring integration as a "remedy" for segregation in the past not therefore inappropriate?

The requirement, however, the courts say, is not integration but only desegregation, the undoing of unconstitutional segregation, not the undoing of all racial seperation whatever its cause. A simple requirement of integration or racial balance would be applicable wherever racial imbalance exists, and would require producing as much racial balance as is possible or feasible. A requirement of desegregation, however, is importantly different in that, first, it applies only where existing racial imbalance has been caused by past unconstitutional segregation (racial discrimination) and is therefore itself unconstitutional segregation, and second, it requires only that the schools be made as racially integrated or balanced as they would be except for the past practice of unconstitutional segregation. It is this that justifies calling the requirement "desegregation" and a "remedy" for unconstitutional segregation. As the Court stated in Swann, the requirement is only "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." The requirement is only to make "the racial distribution of the ...

school population ... what it would have been in the absence" of unconstitutional segregation. Dayton, supra, at 420.

The difficulty with the courts' rationale for compulsory integration and busing is, of course, that it is patently untrue: It does not explain or justify what the courts require in fact. As Justice Powell, for one, has many times pointed out, the busing ordered in Swann itself and in every later case cannot possibly be explained as merely creating the racial balance that would have existed had there been no past segregation; it can only be explained, contrary to what the courts say, as simply requiring racial balance as such. Racially imbalanced schools quite obviously everywhere exist even in the absence of a history of segregation, and the courts have required busing for racial balance in areas, such as Denver and Detroit, with no history of segregation.

Unconstitutional segregation, the assignment of children to separate schools according to race, ended in this country more than fifteen years ago as a result of the 1964 Civil Rights Act, and the racial imbalance that exists in the nation's schools today cannot to any significant degree be attributed to past segregation. As a result, as discussed below in connection with Congress' Fourteenth Amendment authority, no more is apparently required to end court-ordered busing than for Congress to correct the courts' misperceptions of fact.

Congress' Article III authority

The Constitution does not establish or require lower federal courts; Article III section 1 grants Congress authority to "ordain and establish" them at its discretion. Congress chose to create lower federal courts at its first session under the Constitution in the 1789 Judiciary Act, but Congress has never seen fit to vest in them the full "judicial power of the United States" as defined in the Constitution. Congress has granted them only such jurisdiction as it from time to time saw fit. The Constitution, Article III section 2, does require a Supreme Court, vests it with a very limited original jurisdiction, and provides for its exercise of appellate jurisdiction, but only "with such Exceptions, and under such Regulations as the Congress shall make." Accordingly, the

Supreme Court's appellate jurisdiction has varied from time to time as provided for by Congress.

From these facts alone it would seem clear that Congress' authority to regulate federal court jurisdiction except for Supreme Court original jurisdiction is plenary. Further, as noted above, because the federal courts have been permitted to acquire and exercise an extremely broad, indeed virtually unlimited, power of judicial review as to matters within their jurisdiction, complete congressional control over that jurisdiction is essential to any attempt to maintain a system of representative self-government. A claim that Congress lacks sufficient authority over federal court jurisdiction to deal effectively with the national tragedy of court-ordered busing is scarcely credible. All that is necessary is that Congress deny federal courts jurisdiction to order the exclusion of students from their neighborhood schools because of their race; the constitutional text, democratic principle, and precedent leave little basis for doubt that Congress has that authority.

As discussed above, busing is, in constitutional theory, merely a "remedy" for the underlying constitutional right to be free of official racial discrimination. Therefore, if, as some have argued, Congress has greater authority to alter "remedies" than rights through regulation of federal court jurisdiction, the power of Congress to prohibit busing would seem all the more beyond dispute. It has also been argued, however, that busing is sometimes an essential remedy in "desegregation" cases and that to prohibit or limit the busing "remedy" is therefore to alter the underlying right. This argument is without merit. First, all rights are defined by their remedies; to alter any remedy is necessarily to alter the underlying right. This fact cannot limit Congress' authority over federal court jurisdiction, or any jurisdiction once granted would have to be granted forever. Second, there is no constitutional right to have any claim, constitutional or otherwise, litigated in a federal court, just as there is no constitutional requirement that there be lower federal courts. The argument is based on the premise that federal courts have some constitutionally derived minimum jurisdiction, a premise that, as noted above, is untenable. The sole jurisdiction of the lower federal courts, as both the Constitution and uniform precedent make clear, is the jurisdiction granted them by Congress, and they can have no role or function outside of that jurisdiction.

The plenary nature of Congress' authority to regulate lower federal court jurisdiction has been uniformly recognized by the courts, and all challenges to exercises of that authority have been rejected. In the Emergency Price Control Act of 1942, for example, Congress removed all federal district court and court of appeals jurisdiction to enjoin enforcement of the act, permitting challenges only in a special court created by the act. In Lockerty v. Phillips, 319 U.S. 182 (1943), the Supreme Court, upholding Congress' authority to so limit federal court jurisdiction, stated:

> There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1 of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. Kline v. Burke Construction Co., 260 U.S. 226, 234, and cases cited; McIntire v. Wood, 7 Cranch 504, 506. The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' Cary v. Curtis, 3 How. 236, 245.

In Yakus v. United States, 321 U.S. 414 (1944), the Court sustained the authority of Congress to deny district courts jurisdiction to consider constitutional challenges to regulations issued under the act even as a defense to criminal charges prosecuted in the district courts.

The 1932 Norris-LaGuardia Act, narrowly limiting federal court jurisdiction to issue injunctions in labor disputes, perhaps presents the closest analogy to a statute removing federal court jurisdiction to require racial discrimination, i.e., to enjoin an racial grounds the assignment of children to neighborhood schools. The effect of the Norris-LaGuardia Act was undoubtedly to deny or diminish pre-existing rights of employers, including rights recognized at the time as constitutional rights. Indeed, only a short time earlier the Court had held unconstitutional state legislation similarly limiting the availability of injunctions to employers in labor disputes. Truax v. Corrigan, 257 U.S. 312 (1921). Nonetheless, a constitutional challenge to the Norris-LaGuardia Act was disposed of by the Supreme Court in one sentence: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938).

In the Portal-to-Portal Act of 1947, Congress destroyed very substantial rights by simply removing all federal (and, indeed, state) court jurisdiction "to enforce any liability or impose any punishment" on employers for refusal to pay wages that had previously been held to be due. Despite very substantial due process and just compensation claims under the Fifth Amendment, the act was uniformly upheld by the courts. E.g., Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711 (3d Cir. 1949).*

It should be noted that to deny federal courts jurisdiction to order that students be assigned to school by race would not be to deny them jurisdiction to consider alleged violations of the right to be free of official racial discrimination, the right busing orders purport to enforce. Federal courts would still have jurisdiction to consider a claim that, for example, an assignment is racial and to require that it be according to non-racial criteria. Courts would simply be without jurisdiction to order the "remedy" of racial assignment.

Further, by simply permitting the free transfer of students from their neighborhood schools to any other school of their grade in the school system, school authorities would obviate any claim by any student that he has been excluded from any school because of his race. A free transfer option is obviously desirable; where it exists each student may attend the school of his choice, and any complaint about the racial composition of any school would then be in essence a complaint about the choices made by others.

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* Some court seemed to think they had jurisdiction to pass on the merits of the constitutional claims before deciding that Congress could validly deny them jurisdiction to do so. E.g., Bataglia v. General Motors Corp., 169 F.2d 254 (2nd Cir. 1948). As the act was nonetheless always upheld, the point was purely academic.

It seems clear, therefore, that regardless of whether or not busing is, as the courts claim, merely a "remedy," Congress can prevent court-ordered busing by removing federal court equity jurisdiction to issue mandatory injunctions requiring the exclusion of students from their neighborhood schools because of race. Congress should also make explicit that the removal of federal court jurisdiction to require school racial assignments and exclusions includes removal of jurisdiction to require the continuation of such assignments and exclusions pursuant to earlier-entered orders. Following the example of the Portal-to-Portal Act, Congress could provide that school authorities shall not be subject to any punishment or other liability for not assigning students by race or for assigning them nonracially. Perhaps better, Congress could provide that any school district subject to a federal court order requiring racial assignments may apply for modification of the order, in accordance with the federal court's then existing jurisdiction, so as to simply enjoin all acts of racial discrimination in operation of the school system.

Although Congress can and should, as discussed below, also rely on its Fourteenth Amendment authority, its Article III authority to regulate federal court jurisdiction is certain and complete. If Congress is serious about ending court-ordered busing, as it should be, it should, therefore, make clear that it is so exercising its Article III authority that that exercise will be sufficient in itself to end court-ordered busing in the event that, for any reason, other statutory provisions based on Congress' Fourteenth Amendment authority should be found invalid or inadequate.

The following provision is suggested:

> No court of the United States shall have jurisdiction to issue any order requiring, directly or indirectly and whether or not based upon or pursuant to any prior order, the assignment of any student to, or the exclusion of any student from, any school on the basis of race, color, or national origin.

Congress' Fourteenth Amendment authority

Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Beginning with South Carolina

v. Katzenbach, 383 U.S. 301 (1966), and Katzenbach v. Morgan, 384 U.S. 641 (1966), and continuing through Oregon v. Mitchell, 400 U.S. 112 (1980), Rome v. United States, 446 U.S. ___ (1980), and other cases, the Court has generally interpreted Congress' authority under Section 5, and under the nearly identical Section 2 of the Fifteenth Amendment, broadly. These decisions establish that Congress' legislative authority is not confined to providing enforcement mechanisms for rights protected by the amendments themselves as interpreted by the courts.

Although the scope of Congress' Fourteenth Amendment authority is uncertain, this uncertainty is not directly relevant and need not be pursued here. Important for our purposes is the Supreme Court's clear recognition in all of these cases of the superior fact-finding capabilities of Congress and, therefore, of the appropriateness of judicial deference to congressional fact finding. Effective exercise of its Fourteenth Amendment authority to stop busing does not require that Congress have the authority to redefine constitutional rights; it requires only that Congress authoritatively determine that the factual premises on which court-ordered busing is based are mistaken.

As discussed above, in constitutional theory there is no constitutional right to racially integrated or balanced schools, and courts, therefore, do not order busing simply to create racial integration or balance for its own sake. They order busing only to enforce Brown's prohibition of school segregation -- i.e., of racial discrimination by school authorities -- to de-segregate the schools by removing the racial separation or imbalance that is the result of past unconstitutional school segregation. In short, the only justification for court-ordered racial assignment and the busing it entails is to make the schools as racially balanced as they would be had there been no unconstitutional school segregation. The exclusion of students from their neighborhood schools because of their race is constitutionally required and justifiable only to ensure, as the Court said in Swann, "that school authorities exclude no pupil of a minority race from any school, directly or indirectly, on account of race."

It is clear, therefore, that court-ordered busing is based on two factual premises: first, that the racial imbalance that exists in the nation's schools today is the result of past unconstitutional school segregation and that except for such segregation the schools would be fully integrated or balanced, and second, that court-ordered busing is an effective means of producing greater school racial integration or balance. Pursuant to its responsibility to enforce the Fourteenth Amendment, Congress should investigate these factual premises, if it has not done so already. If the first premise -- the cause of existing school racial separation— is mistaken, court-ordered busing is itself unjustifiable racial discrimination by government in violation of the Fourteenth Amendment. If the second premise -- that busing increases racial intregation -- is mistaken and if busing actually operates to increase racial separation, then busing is self-defeating and counterproductive in terms of Fourteenth Amendment values.

There is overwhelming evidence that the factual premises of court-ordered busing are mistaken. First, the practice of racial segregation ended in this country some fifteen years ago as a result of the 1964 Civil Rights Act. For the past fifteen years disputes have been not over ceasing to segregate but over compulsory intregation. For many years most or all school districts, voluntarily or under court order or pressure from federal agencies, have acted to, not segregate, but to increase intregation. School racial separation or imbalance exists and has always existed in all areas with a racially mixed population, including areas that never practiced segregation. It seems clear that the racial separation or imbalance existing in the nation's schools today is not to any significant degree the result of the past practice of segregation or other racial discrimination by school authorities. In this connection it is important to bear in mind that the purpose of school desegragation is to overcome past racial discrimination by school authorities; it is not an attempt to overcome the effects of all racial discrimination past or present in society. As the Supreme Court stated in Swann:

> The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage.

Second, it appears that the effect of court-ordered busing, especially in urban areas where a large majority of blacks now live, is always or almost always to increase racial separation because of the rapid departure of the middle class, predominately white, from public school systems subject to busing orders. The result is increased racial separation not only in the schools but in our cities. Busing may also be the most serious single present cause of racial friction and hostility. Whatever the cause of existing school racial separation, it seems clear that court-ordered busing serves only to exacerbate it.

If Congress should find that one or both of the facutal premises of busins are mistaken, the authority and responsibility of Congress to act under the Fourteenth Amendment are clear. Although, as stated above, Congress can, in my opinion, end court-ordered busing by exercise of its Article III authority alone, Congress obviously may also exercise its Fourteenth Amendment authority, either independently of Article III or as a supplement -- even if no supplement is necessary -- to its exercise of its Article III authority. Congress could simply make the appropriate findings a preliminary statement to a provision such as is suggested above, removing federal court jurisdiction to require racial assignments or exclusions either as an original order or pursuant to a pre-existing order.

Another way to deal with existing busing orders is for Congress to provide that such orders shall terminate within a definite period, say two years, after their effective date if the school district has fully complied with the order during the period. The Supreme Court made clear in *Swann* that busing orders are not to be perpetual:

> At some point, these school authorities and other like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.

It is surely within the capability and authority of Congress to find and declare that the continuing effects if any, of past segregation as a cause of present racial separation or imbalance have been completely removed or cancelled by good faith compliance with a "desegregation" order for a number of years.

In my view this legislation should apply only to busing ordered by federal courts. The people of each state should be responsible for the conduct of their state courts, and busing to increase integration that is voluntarily undertaken by local school authorities with the consent of the local population may not have the effects of court-ordered busing.

S.1647

The approach of S. 1647 is, in my opinion, basically sound. My major concerns are, first, that S. 1647 is confined to lower federal court jurisdiction and does not limit Supreme Court appellate jurisdiction . The result is that busing cases can still be brought to the Supreme Court through the state court systems, and the Supreme Court apparently will continue as free to order busing as it is now. Second, the apparent intent of S. 1647 is to prevent busing under existing as well as future orders, but this should be made explicit. The considered judgment and intent of Congress on this point should be clear beyond dispute.

PREPARED STATEMENT OF PROF. LAURENS WALKER

Mr. Chairman and Members of the Subcommittee, my name is Laurens Walker and I am Professor of Law at the University of Virginia. I want to thank the Subcommittee for inviting me here to comment on the proposed Neighborhood School Transportation Relief Act of 1981. Since the beginning of my teaching career I have taught courses in federal civil procedure (with particular attention to the United States District Courts) and from time to time I have taught a course in remedies. My research and writing interests have also been generally focused on those subjects, and the function and role of the judge have been a major subject of my study.

I have briefly described my professional interests so that you will know the area of my competence and understand my proposal to concentrate on the authority of Congress under § 1 of Article III of the Constitution of the United States to regulate the jurisdiction of the inferior federal courts of the United States. I am aware that authority for the proposed action may well also exist under § 5 of the 14th Amendment of the Constitution and that there are sound arguments for such a contention. Nevertheless, I can probably make best use of the Subcommittee's time by limiting myself to the area most closely associated with my professional interests.

I think it important to begin by recalling that the proposed legislation centers on the inferior courts of the United States and the judges of those courts and provides that no jurisdiction shall exist to issue any injunction, writ, process, order, rule, judgment, judgment for contempt, decree or command in three specifically described situations. The first relates to the assignment or transportation of public elementary or secondary school students for the purpose of altering the racial or ethnic composition of the student body; the second relates to closing schools and transferring students for the purpose of altering racial or ethnic composition; and the third relates to honoring faculty or administration contract provisions specifying the public school where duties are to be performed. Thus the particular mechanism chosen for carrying out the stated purposes of the Transportation Relief Act is the elimination of the jurisdiction of the inferior federal courts to provide certain remedies (primarily the injunction) in three specified situations. The question, of course, arises at this point as to whether Congress has the constitutional authority to take this proposed action. In my opinion, Mr. Chairman, the Congress does have that authority because both ample precedent exists for such action and, more broadly, because the chosen technique is not inconsistent with the fundamental plan of judicial administration incorporated in the Constitution.

Permit me to review the authority for this proposed action. The starting point is § 1 of Article III of the Constitution which provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." While it might be argued that Article III requires the Congress to establish inferior federal courts invested with the full scope of Article III jurisdiction, that point of view has been repeatedly rejected by the Supreme Court. The quotation of language from court opinions can be tedious, but the language of these cases is so direct and decisive of the issue that the force of the authority can only be appreciated through attention to the opinions themselves. As early as 1799 Justice Chase, in the course of argument in *Turner* v. *Bank of North America*, 4 U.S. (4 Dall.) 8, 10, commented that "The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. . . . Congress is not bound . . ., to enlarge the jurisdiction of the federal courts to every subject, in every form which the Constitution might warrant." In *Carrie* v. *Curtis* 44 U.S. (3 How.) 236, 245 (1845) Justice Daniel wrote for the Court that the judicial power of the United States is "dependent for its distribution and its organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to the Congress may seem proper for the public good."

In *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448-49 (1850) the rationale was spelled out in detail by Justice Grier: "It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result, - either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."

Finally, in Allen v. McCurry 449 U.S. 90, 103 (1980), decided less than a year ago, the Supreme Court reversed a court of appeals decision, and Justice Stewart wrote for the Court that "the actual basis of the court of appeal's holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of the Congress." Thus in a long line of cases and in clear statements the Supreme Court has recognized congressional authority over the jurisdiction of the inferior federal courts.

Additional precedent for the proposed action also exists in the form of analogous legislative action by the Congress that has been accepted almost without challenge. The earliest example is the Anti-Injunction Act of 1793, 28 U.S.C. § 2283, which prohibits a court of the United States from granting an injunction to stay proceedings in a state court. In 1932 Congress passed the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 which narrowly restricts the authority of the federal courts to issue a restraining order or a temporary or permanent injunction in "a case involving or growing out of a labor dispute." The Act also provided that certain contracts "shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." Apparently the principal draftsman was Professor (later Justice) Frankfurter who structured the legislation as a limitation on the "jurisdiction" of the inferior courts just as the proposed legislation is structured. The constitutional validity of the Norris-LaGuardia Act was upheld by the Supreme Court in Lauf v. E.B. Shinner & Co. 303 U.S. 323, 330 (1938). Justice Roberts, writing for the Court, dismissed with one sentence the claim that Congress lacked authority to restrict jurisdiction: "There can be no question of the power of the Congress thus to define and limit the jurisdiction of the inferior courts of the United States." Similar action was taken by the Congress in 1934 with the passage of the Johnson Act, 28 U.S.C. § 1342 which deprives the District Courts of jurisdiction to enjoin, under certain conditions, compliance with state orders fixing rates for a public utility. In 1937 Congress passed the Tax Injunction Act, 28 U.S.C. § 1341 which prohibits the District Courts, under certain conditions, from enjoining the assessment, levy or collection of state taxes. These legislative precedents indicate that the key mechanism of the Transportation Relief Act is certainly not novel, but probably spurs debate because of the purposes or substantive policies stated in the Act.

Mr. Chairman, I said in the beginning that in addition to the specific authority of these cases I believed that the Transportation Relief Act was within the § 1, Article III authority of Congress because the proposed limitation is not inconsistent with the fundamental constitutional plan for the administration of justice. The proposed mechanism leaves available the state courts for enforcement of constitutional rights which may be claimed by persons seeking the prohibited federal remedies. Moreover, the proposed Transportation Relief Act does not affect the jurisdiction of the Supreme Court to review ensuing state court decisions and provide useful national standards for dealing with this difficult subject matter. This situation seems to present the first and apparently easy question addressed by Professor Hart in his well-known dialogue, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953). The question was posed, "Does the Constitution give people any right to proceed or be preceeded against, in the first instance, in a federal rather than a state court?" The reply was, "It's hard to see how the answer can be anything but no, in view of cases like Sheldon v. Sill and Lauf v. E.B. Shinner & Co. and in view of the language and history of the Constitution itself. Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court." Id. at 1362-63 (footnotes omitted).

The role of the state courts in enforcing federal remedies has not received much attention in recent years, but there is indeed considerable evidence, as Hart suggests, that the original constitutional plan contemplated a substantial, perhaps dominant role for the state courts in enforcing federal rights. One need go no further than to note that it was eighty-six years after enactment of the Judiciary Act of 1789 that an inferior federal court was given jurisdiction in all cases arising under the federal constitution and laws. See generally, Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923). Fortunately, there seems to be some recent recognition of the role of the state courts in these matters. In Stone v. Powell, 428 U.S. 465, 493-94, n.35 (1975), Justice Powell, writing for the Court, reaffirmed the Constitutional obligation of state courts to uphold federal law and expressed confidence in their ability to discharge this obligation. See Allen v. McCurry, 449 U.S. at 105. Perhaps there are members of this Subcommittee or other members of Congress who would prefer that the state courts not employ the remedies treated in the proposal or who would support some limitation of the Supreme Court's role, but neither of these restrictions is incorporated in the proposed legislation and the ramifications of such changes are not now in question. As drafted, the Transportation Relief Act essentially limits the availability of an original federal forum for the award of certain remedies, but does not eliminate the opportunity to secure those remedies elsewhere. As such, Mr. Chairman, it is my opinion that the proposed course of action is well within the authority of Congress under § 1 of Article III of the Constitution.

PREPARED STATEMENT OF ROBERT W. MESERVE

Thank you, Mr. Chairman and Members of the Subcommittee, for the opportunity to appear before you to present the views of the American Bar Association on constitutional issues surrounding proposed legislation which would limit busing orders of federal courts, whether all such courts, or inferior courts only -- and whether or not expressly couched in jurisdictional terms -- so long as the enforcement of clear constitutional rights will be, in fact, adversely impacted.

My name is Robert W. Meserve. I am a practicing attorney from Boston, Massachusetts, and a former president of the American Bar Association. I appear as a representative of the American Bar Association, and this is a situation in which I have specific instructions from my client. Only this summer the Association's House of Delegates voted, almost unanimously, to oppose all efforts by Congress to use its undenied Article III power to regulate the jurisdiction of the federal courts if the objective is to accomplish changes in substantive constitutional law -- changes which the American constitutional system has entrusted to the amendment process. The ABA, however, as I hasten to add, has taken no position on the general policy of busing itself, nor on any other substantive policy which could be affected by such legislation.

On August 11th of this year, the ABA, by an overwhelming, virtually unanimous, vote of its democratically-elected, fairly representative, House of Delegates (speaking for a majority of this country's lawyers), approved a resolution which stated the Association's opposition to "the legislative curtailment of the jurisdiction of the Supreme Court of the United States or of the inferior federal courts for the purpose of effecting changes in constitutional law." A copy of that resolution and the accompanying supporting scholarly report is appended to my statement and is well worth reading, I submit.

As the language of the resolution and the report make clear, the concern of the Association focuses on possible efforts to manipulate jurisdiction -- including jurisdiction to grant remedies, e.g., busing -- to achieve such substantive alteration of constitutional law as Congress could not bring about by passage of ordinary legislation or by any procedure short of constitutional amendment. The Association has a long record of standing against proposals to alter our constitutional system by legislatively (or through the executive process) limiting or curbing the role of the federal courts.

In the early years of this century, we opposed proposals that would have subjected Supreme Court constitutional decisions to "recall" by two-thirds majorities of Congress. At the depths of the Great Depression, when court-curbing bills were numerous and President Roosevelt's "Court packing" plan was put forth, a general assembly of the Association, in 1936, adopted a resolution disapproving "all bills and amendments to the Constitution ... the purpose or effect of which is to limit the jurisdiction or abridge the powers as they now exist of any federal court as at present constituted to pass upon the constitutionality of any law." And in reliance on that action, the ABA successfully led the opposition to the President's plan to enlarge the Supreme Court a year later. In 1958, with concern high in Congress over certain decisions of the High Court on state and federal anti-subversion laws, the House of Delegates resolved that, "reserving our right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States, the American Bar Association opposes the enactment of legislation which would limit the appellate jurisdiction of the Supreme Court of the United States."

Our consistent position with respect to this issue springs from our commitment to the rule of law and our feeling as to the proper place of the federal courts in our constitutional system. The judiciary power which the Constitution lodges in those courts, ultimately for possible final decision by the Supreme Court, includes the power of constitutional review -- the power to determine in a case properly brought what the rights of the parties to the suit are under the Constitution. That ruling specifically binds the parties and establishes the "rule of the case" and precedent governing or guiding lower courts in the resolution of the same or similar controversies between the same or other parties. The rule of stare decisis allows citizens to plan their future conduct, relying on prior determinations of applicable law.

The amendment process, established in Article V of the Constitution, is the appropriate way to alter the Constitution and interpretations of it which the Supreme Court has rendered and to which it adheres. That process, which requires extraordinary majorities in Congress and among the States, gives stability to our democratic system. It is, as Justice Frankfurter stated, a "leaden-footed process," which by its very elaborateness guarantees serious reflection by all the people on the import of such constitutional changes, before the will of the majority is duly enacted. The intent of the Framers, as evidenced by Federalist numbers 10 and 78, was to establish not only a government responsive to the majority's will, but also one which avoided frequent shifts in its fundamental law by providing some shelter from transient whims of the public.

We do not believe that the acknowledged absence of congressional power to bypass this amendment process by simple legislation can, or should, be filled by the expedient of couching what are legislative enactments in jurisdictional or remedial terms. That, simply put, was the basis of the ABA's latest resolution, an amalgam of constitutional and policy concerns respecting the use of jurisidictional legislation to accomplish what cannot be achieved substantively.

The language of S.1647 indicates that its purpose goes beyond questions of remedy or even of regulation of jurisdiction, and does, in fact, aim at altering the substantive law. In Section 2(b)(3), the bill states that the assignment and transportation of students to schools "is not reasonably related or necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful, segregation because such segregation can be eliminated without such assignment and transportation." This contradicts holdings of the federal courts in specific cases. The bill further states that such assignment and transportation fails to account for data indicating that racial and ethnic imbalance in the schools is often the result of economic and sociological factors rather than past discrimination by public officials. As busing has not been ordered by courts in the absence of findings of de jure segregation, this, too, is an attack on prior legal conclusions of the federal courts in specific cases. Section 2(b)(11) states that busing has been undertaken without any constitutional basis or authority. Again, this directly contradicts a long and established series of holdings by the Supreme Court, whose province and duty it is to say what the law is, a principle declared by John Marshall in Marbury v. Madison and generally accepted.

The ABA has serious doubts as to the constitutionality of proposed legislation of this type. It is true that Congress has power to determine the jurisdiction of inferior federal courts. That power is vested in you by the express language of Article III of the Constitution and has been supported -- if that were needed -- in a number of Supreme Court cases. We do not doubt that as a general proposition Congress has discretion to place some issues exclusively in the inferior federal courts, exclusively in the state courts, or, concurrently in the two sets of courts. We do not doubt that Congress can prescribe the manner in which cases go to the Supreme Court. But we doubt your authority to adopt rules of decision or to make findings of fact in cases now, or in the future, before the courts, or to deny the only remedy effective to right constitutional wrongs.

Neither history, logic, nor constitutional language support the proposition that congressional power is absolute. It seems clear to us that when Congress legislates pursuant to the "exceptions and regulations" clause and to its authorization to create inferior federal courts, it is as bound by constitutional restraints upon the exercise of those powers as it is when it legislates under any of its other granted powers. When Congress regulates interstate commerce, when it provides for a postal system, when it taxes and spends, when it legislates pursuant to any of its granted powers, it must observe the Bill of Rights, and the strictures of Section 9 of Article I. It is similarly bound when it exercises its power under Article III.

James Madison, in 1789, stated to the House of Representatives during consideration of his proposed amendments (the Bill of Rights) that they would not be mere "parchment barriers" against legislative infringements because "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." It is unlikely that the men who framed the Bill of Rights, and designed the guardianship of those rights, intended that the legal check upon legislative infringement could be so easily circumvented by the enactment of jurisdictional, procedural, or remedial legislation.

Various decisions of the Supreme Court suggest that there are limits to the jurisdictional power of the Congress, beyond which it may not go. United States v. Klein, in which the Supreme Court invalidated legislation which denied jurisdiction to the Court of Claims to give evidentiary value to a presidential pardon is such a case. It indicates that the Court will not allow such legislation to undermine fundamental judicial protection of individual rights. In other cases, the court has construed jurisdictional legislation in such a way that it does not conflict with the enforcement of constitutional rights. See Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968); Crowell v. Benson, 285 U.S. 22 (1932).

In all United States history, Congress has not -- at least generally -- used, or attempted to use its power under Article III to circumvent established constitutional law. And, in a parallel effort to avoid serious conflicts on fundamental issues between branches of government, the Supreme Court has attempted to construe statutes so that such a conflict will not arise. These efforts have avoided conflict -- conflict potentially disruptive of the constitutional structure of our system of government. Such efforts also mean that the exact position of the line beyond which Congress may not go has not been clearly laid down. It seems to us, however, that this legislation, as part of an effort to undermine constitutional decisions without going through the constitutionally-prescribed process of amendment, quite likely is beyond that line.

We do not find persuasive the efforts of some proponents, in bills and draft bills we have seen, to premise validity upon a theory of congressional power over remedies, whether or not couched in jurisdictional terms. The ABA resolution puts us in opposition as much to selective manipulation of jurisdiction, as to exclusion of whole classes of issues from federal judicial review. That is, we do not think that, in those cases where a particular remedy is constitutionally necessary, Congress either can, or should purportedly, deny jurisdiction to a federal court to order that remedy while it leaves to the court the authority to hear the case and to order other, perhaps ineffective, remedies. Of course, it may well be difficult in particular cases to determine whether the disfavored remedy is the only one that will undo the constitutional violation and hence to determine if Congress has the substantive power to bar utilization of that remedy. But that is the correct approach to analysis. Does Congress have the power to restrict that remedy, is the proper question, and not whether Congress can simply deny jurisdiction to grant a certain remedy in a case properly within the court's cognizance.

We recognize that there are precedents in which Congress couched remedial limitations in jurisdictional terms and was sustained by the Supreme Court. Perhaps the closest precedent is the Norris-LaGuardia Act in which the federal courts are, on the face of the legislation, denied "jurisdiction" to issue injunctions in specific labor disputes. And yet it seems to us that Norris-LaGuardia is sustainable because the substantive power exists to bar the labor injunctions if certain findings of fact are made, and such injunctions are not (or have not been, with decided cases), constitutionally required remedies. In Truax v. Corrigan, 257 U.S. 312

(1921), a majority of the Court had held unconstitutional a state denial o the injunction in a labor dispute as a violation of substantive due process. But by the time the constitutional validity of Norris-LaGuardia reached the Supreme Court, the substantive due process approach to economic regulation had been abandoned and such an injunctive remedy was no longer constitutionally mandated. We call your attention to the fact that a year before the Supreme Court in Lauf v. E.G. Skinner & Co., 303 U.S. 323 (1938), sustained the constitutionality of Norris-LaGuardia, it held constitutional a state statute quite similar to that struck down in Truax v. Corrigan, though without actually overruling the earlier case. See Senn v. Tile Layers Union, 321 U.S. 468 (1937).

Therefore, to reiterate, we oppose a denial of the right to a remedy if, in a particular case, it be a needed remedy to rectify a constitutional wrong, as well as an express limitation of jurisdiction. Such a denial must be based upon substantive power to achieve the sought-for result to much the same degree as the other enactments we have discussed.

If this legislation is passed, it will leave the Supreme Court two unsatisfactory options by which to deal with cases in which a court finds a history of de jure segregation. If the determination is made in a federal court, it may seek a remedy other than busing. However, because of the historical nature of the offense, past judicial history has indicated that a court may feel that busing is constitutionally mandated as the only means of enforcing the decision that "separate is not equal." The Supreme Court, to implement its constitutional principles, must either order the federal courts to disregard the proposed jurisdictional limitations, on the basis already discussed, or some other, or order that any action for such remedy be brought in a state court, which will have exclusive jurisdiction to hear such pleas and to grant such relief.

As a legal matter, an effective removal of jurisdiction from our inferior federal courts to the state courts should not alter the substantive law on these matters. Petitioners will look for implementation of their rights solely to the state courts, but they are, in turn, subject to U.S. Supreme Court review. The state court judges are bound by their oaths to uphold the federal law. The ABA has great confidence in the will and desire of the state judges to perform their duty. This legislation, however, probably puts unfair pressure on the state judges in any event, and is not an efficient allocation of judicial resources.

Because of the legislation's statement of purpose, it will stand as an invitation to the state judges to disregard established law. The judges will be subjected to pressure from the very groups who desire to evade federal law, without going through the challenges of the amendment process. As state judges are not protected by federal constitutional guarantees of tenure and compensation and many hold their position by periodic elections, such legislation will subject them to great temptation, peril, and the unenviable choice in many cases between oaths and careers. Though we have great confidence in our State Court judges, it is unfortunate and unfair to put them in positions where it may be thought they have conflicts of interest.

When the object of denying federal courts such jurisdiction and remitting federal claimants to state courts is hostility to the right being claimed; when the purpose and hope are that state courts will somehow alter the interpretation or the method of enforcement properly given in the federal courts; then we think that such legislative endeavor is improper. It unfairly politicizes state judges; it puts them under pressure to disregard established law. It also politicizes the judicial consideration of constitutional issues. And if state legislatures object to state courts following federal precedent denials of state court jurisdiction, in their turn, may find claimants in a hopeless "catch 22" situation, where the only effective remedy for their constitutional wrongs is denied everywhere.

It will also have the deleterious effect of increasing the caseload of state courts by funneling cases involving federal issues to them -- and may add to the Supreme Court's already overburdened docket. Despite all efforts of state judges to apply federal law accurately, the result of having fifty different judicial systems determine these questions will result in a great lack of uniformity of decision across the country, where the basic rights of a citizen should be protected in every case. The final result of such delay and lack of uniformity will be that the public will lose confidence in the administration of justice and will no longer feel able to rely on the Constitution as a rational source of protection for basic rights.

We urge caution upon this Subcommittee and upon Congress. The controverted constitutional issues now being considered in such jurisdictional bills include busing, abortion, and school prayer. But once a precedent has been established, all future Congresses, who find themselves at least momentarily frustrated by Supreme Court interpretations of constitutional law, may be inclined to attempt to evade such restrictions by jurisdictional legislation in other areas.

For example, a Congress may desire to redistribute wealth from a temporarily unpopular minority, such as bondholders who have contracts with the government, to poorer elements of their constituency, and at the same time to avoid levying unpopular taxes. If they attempted to do this by a process which reduced the contractual rights of such bondholders, people who opposed such maneuvers would rely on the contract clause of the Constitution, as well as the due process clause of the Fifth Amendment, to protect them. A Congress, following the example set by this legislation, could evade such problems by denying courts jurisdiction to hear such cases or, if the property has already been taken, denying the remedies of restitution and injunction.

Another example might exist if Congress decided to force purely private institutions and clubs to meet quotas in membership and employment, and passed a law denying necessary licenses, such as liquor licenses, licenses to serve food, and building permits to such entities as did not comply. If Congress also passed jurisdictional legislation which prevented federal courts from hearing such cases or from issuing mandatory injunctions to the officials who refuse such permits, such institutions would be forced to rely on varying state court interpretations. The delays in obtaining Supreme Court review could, in a practical sense, put such entities out of business. Once we start down this road, only an unusual sense of self-restraint may stand in the way of a wide negation (temporary or permanent) of constitutional guarantees. The ABA does not believe Congress can go down this road. We do not believe, even if it could, that it should.

In conclusion, we urge that judicial and legislative sanity argues for a restrained approach to such issues. Even if Congress feels that the Supreme Court or the federal court system has adopted the wrong approach, the remedy is not jurisidictional manipulation, a constitutionally doubtful and politically dangerous policy.

Instead, temperate and responsible opposition to decisions, through writings and speeches, is appropriate.

The Supreme Court often modifies or revises its prior decisions. We concur with a man named Lincoln, who, in a speech in Springfield, Illinois, on June 26, 1857, set forth just this understanding of the appropriate response of the public and of political leaders to unpopular Supreme Court decisions. "We think," Lincoln said regarding the Court, "its decisions on constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this."

We therefore call upon this Subcommittee to evaluate all legislation before it on this issue of busing in light of both desirable policy and substantive constitutional power to enact that policy. We urge you to eschew reliance upon jurisdictional manipulation, which is both undesirable and of questionable constitutional validity.

[Resolution of the American Bar Association, submitted by Mr. Meserve, follows:]

REPORT WITH RECOMMENDATION

AMERICAN BAR ASSOCIATION
REPORT TO THE
HOUSE OF DELEGATES

SPECIAL COMMITTEE ON COORDINATION OF FEDERAL JUDICIAL IMPROVEMENTS

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association opposes the legislative curtailment of the jurisdiction of the Supreme Court of the United States or the inferior federal courts for the purpose of effecting changes in constitutional law.

REPORT

Before the 97th Congress are more than a score of bills which would strip from the original jurisdiction of the lower federal courts certain subject areas involving controversial decisions of the Supreme Court of the United States, notably abortion, school prayers, and busing.* Enactment of such legislation would require persons claiming rights under one or another of these decisions to bring suit in state courts. Moreover, several of these bills would deny the Supreme Court appellate jurisdiction to review the decisions of the state courts with respect to those issues that could be brought only in the state courts.

Sponsors of these bills clearly avow that their purpose is to bring about an altering of the constitutional interpretations that now prevail. The belief is apparently that state courts, if given exclusive power to decide such suits without fear of Supreme Court review, will not follow the precedents established in these areas by the Nation's highest Court.

The Committee recommends to the Association the adoption of this resolution because of one overriding conviction: the necessity to protect the integrity of the courts of this Nation, federal and state, from misdirected legislative efforts to achieve something that can be done only through constitutional amendment. The issue is not abortion; it is not busing; it is not prayer in the public schools; it is not any of a number of things that may occasion dissatisfaction with particular decisions. We are sure that the Members of the Association have many various positions on these substantive questions, as we do. But the real issue, the only issue, is whether, as a matter of policy and of constitutional permissibility, this Nation is going to adopt a device whereby each time a decision of the Supreme Court or a lower federal court offends a majority of both Houses of Congress the jurisdiction of the federal courts to hear that issue will be stripped away. We do not believe that is a system the Framers intended nor one that we should strive to institute.

Supreme Court decisions interpreting the Constitution establish binding precedents which are subject to alteration by the people through the process of constitutional amendment. The Framers provided in Article V a means of changing the Constitution and deliberately made it difficult to achieve. The "leaden-footed process of constitutional amendment," as Justice Frankfurter called it, with the requirement of extraordinary majorities in Congress and among the States, was designed to make sure that transient majorities could not easily change our fundamental law. Are we to believe that after constructing this formidable barrier to easy change, the Framers intentionally or inadvertently also put in place a system in which simple majorities could bring about a rewriting of constitutional law?

The American Bar Association has long opposed efforts, from whatever spectrum of the political scene, to alter constitutional interpretation through means other than constitutional amendment. We stood in opposition to the "Court-packing" plan of the late 1930's, which would have altered prevailing law by stacking the Court's membership. More than thirty years ago we called for the adoption of assurance that jurisdictional manipulation would not and could not be used to work substantive changes in the Constitution. In 1958, the Association opposed bills pending in Congress that would have denied the Supreme Court review of decisions involving alleged subversives in various fields. That policy is Association policy today and the Committee calls on the House to reaffirm it and extend it.

Central to this position is recognition of the great power which Congress possesses under the Constitution to structure and to allocate the jurisdiction of the Supreme Court to hear appeals and the jurisdiction of the lower federal courts - and of the limits on that power. Article III stipulates that the High Court has appellate jurisdiction over practically the entire range of federal judicial matters, subject to such "exceptions and regulations" as Congress provides. Clearly, then, Congress may regulate how cases come to the Court and could deny the Court appellate jurisdiction over some classes of cases altogether, as in fact it has historically done. It could, for example, make a lower federal court's decisions with respect to interpretation of the tax laws or admiralty issues final.

Even greater is Congress' power with respect to the lower federal courts. The compromise at the Constitutional Convention was to create "one Supreme Court" and to leave in legislative discretion whether and when to create and to do away with any "inferior" federal courts. Some of the Framers wanted constitutional assurance of lower courts, but the prevailing number thought that Congress should be able to leave to state court adjudication matters of national interest, subject to Supreme Court review. And to safeguard the national interest and the integrity of constitutional rights, the Framers wrote in Article VI, the "Supremacy Clause," the guarantee that the Constitution, federal laws, and treaties would be the "supreme law of the land" and that "the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Moreover, the same Article requires state judges, as well as all other state officers, to be bound by oath or affirmation to support the Constitution of the United States.

Necessarily, it follows that if the Constitution empowers Congress to provide or not to provide for lower federal courts, it empowers Congress to vest in such lower federal courts that it creates all or only some of the jurisdiction it could give and thus to allocate between state and federal courts the judicial power of the Nation in such ways as it deems to serve the best interests of the States and the Nation. That has been the understanding from the beginning on which Congress has acted and the decisions of the United States Supreme Court are consistent in affirming the correctness of that understanding.

It is thus not with any reservations with respect to congressional power generally that the Committee recommends this resolution. Rather, we are actuated by specific constitutional reservations, more substantial as to Supreme Court appellate jurisdiction than as to lower federal court jurisdiction, and by what we believe to be compelling policy considerations against the propriety and desirability of the bills now pending before Congress.

Even were the constitutional considerations compellingly clear in favor of the validity of these bills, as they are not, we would urge opposition.

First, if it is likely, as we by no means concede it is, that the meaning ascribed to a constitutional provision can be changed by the simple device of divesting jurisdiction from one set of courts and giving it to another, then indeed we have a Constitution writ on sand and the integrity of our amending process is eroded. It is central to our fundamental Charter that ordinary legislation can be changed through ordinary legislation and the Constitution only through amendment. We should resoundingly reject the counsel of those who tell us there is another way. Down that route lie barely-hidden hazards to constitutional governance.

Second, to accept the explicit judgment of the sponsors of these bills that shifting jurisdiction will result in substantive change requires us to dishonor the thousands of state judges who by oath and conscience are bound to adhere to established precedent enunciated by the Supreme Court. We do not doubt that the great majority of state judges will do their duty.

Nonetheless, this legislation is pernicious in concept even if it does not achieve its purpose.

It is bad because it suggests state judges will depart from their oaths. It is bad because it constitutes a congressional invitation to them to depart from their oaths; it says to state judges that Congress believes some decisions are so wrong they ought to be changed and those judges should do it. It is wrong because hundreds or thousands of state judges who are subject to periodic elections will be put in peril. The same interest groups that extract from an elected Congress jurisdictional alterations will demand from elected state judiciaries that they accept the congressional invitation to change. Federal judges are insulated from this and other pressures; the Framers deliberately provided for independence to prevent just these pressures. Congress should not subject state judges to often hard choices between oath and career.

Finally, if most state judges honor their oaths, the status of the objected-to constitutional decisions will be frozen in place. The Supreme Court cannot hear such cases and perhaps overrule them or alter them in any way. And as new fact situations arise, state court interpretations will begin to create somewhat different rules which will vary from State to State.

Third, either because of disagreement with the substance of these decisions or because of electoral pressures, some state judges may indeed accept the invitation of Congress and refuse to follow Supreme Court precedent. Because there would be no Supreme Court review, in those States federal constitutional law would change and the Constitution would mean something different from State to State. This result would be pernicious because fundamental liberties - whether the ones which are the subjects of these bills or others in the future if these succeed - will have been altered in some States and depreciated in all because of the demonstration that, contrary to what we have always believed, constitutional rights are subject to evanescent majority opinion. While the constitutional rights at peril today may not be valued by some, those at peril tomorrow may be freedom of speech, or just compensation for property taken for public use, or the guarantee against impairment of the obligation of contracts.

Even were Congress to adopt an approach, which is found in a few of the pending bills, of depriving the lower federal courts of jurisdiction and continuing Supreme Court review of state court decisions in those areas, we believe that should be opposed as well. Basic to that effect would be a conclusion that alteration of substantive law could still be achieved which contains the same insult to state judges and the same possible injury to them. Supreme Court review could always alleviate some of the problem should some state judges depart from precedent, but the High Court's caseload is such that it could insure adherence to precedent only by taking an inordinate number of state cases in these areas to the neglect of its many other functions in interpreting national law.

Certainly, in the absence of Supreme Court review, the command of the Supremacy Clause that the Constitution be the "supreme law of the land" could become a nullity. Since the adoption of the Judiciary Act of 1789, a constant feature of the history of federal court jurisdiction in this country, upon which the Nation continues to depend, has been the review by the United States Supreme Court of state court interpretations on questions of federal constitutional law. If, as Justice Holmes reminded us, a page of history is worth a volume of logic, that singular fact stands as a practically unanswerable argument against jurisdictional legislation that would remove Supreme Court review of state court interpretation of the Constitution.

With regard to the constitutional validity of these bills, the Committee doubts that, with respect to the Supreme Court's appellate jurisdiction, they can be sustained as proper "exceptions and regulations" and we have reservations about the bills' divestitures of lower federal court jurisdiction as well. Numerous arguments have been addressed to the question, some based on theories of the "essential functions" of the federal courts, some on equal protection concepts governing the decision to restrict jurisdiction over certain disfavored issues, but we believe the correct analysis to be grounded upon what limits the Constitution itself places upon congressional exercise of any of its granted powers. The Constitution explicitly authorizes Congress to make exceptions to the Supreme Court's appellate jurisdiction and implicitly to determine what, if any, jurisdiction the lower federal courts are to have. Proponents of these bills read these authorizations not only as if they are plenary powers but as if they are completely unrestrained. But this cannot be so. The Constitution authorizes Congress to regulate interstate commerce, to tax, to spend money, to create a postal system. None of these powers is conferred in language that then says, "but you cannot regulate commerce to deny the right to transport political literature across state lines," or "but you cannot bar from the mails newspapers that oppose the position of the majority in Congress." Rather, these powers are conferred in the manner in which Chief Justice Marshall described the commerce power in *Gibbons* v. *Ogden*. "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."

Just so is the power to structure jurisdiction. It is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the Constitution*. And what is prescribed in the Constitution? The First Amendment, the Fourth Amendment, and the Fifth Amendment, and all the other limitations upon the powers conferred on Congress in other parts of the Constitution obviously are those limitations. They restrain the power of Congress to legislate with respect to other constitutional provisions under granting clauses which would appear on their face to be unlimited. To construe the congressional power to structure jurisdiction the way the proponents would construe it would be to make it the only power conferred on Congress that is beyond the constraints of other provisions of the Constitution. Obviously, this cannot be so.

Important to this issue is the fact that while the authorization to Congress to structure the jurisdiction of the courts is contained in the body of the Constitution adopted in 1789, the relevant limitations are in the Bill of Rights, proposed and adopted in 1791, which are operative as to all of Congress' powers conferred in the Constitution itself. Thus, even if the Framers in the Convention did not conceive of the jurisdictional powers being limited, although it is likely they did, adoption of the Bill of Rights did so limit them. Madison, we must remember, stated in the House of Representatives on June 8, 1789, that the amendments he proposed would not be "parchment barriers" to federal action, because "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."

No Supreme Court precedent stands in the way of this reading. The *McCardle* case (1869) is of limited value, not only because it arose in the context of post-Civil War radicalism, but because, as the Court plainly stated, it did not bar all access to the Supreme Court but only one avenue of appellate review. Within three years of *McCardle*, the Court in the *Klein* case (1872) held unconstitutional an attempted exercise of congressional power over its jurisdiction for the purpose of nullifying the President's pardoning power. Certainly, *McCardle* lends support to the proponents of these bills but far less support than they pretend.

The only complexity that enters into the argument is that when Congress removes from the jurisdiction of the federal courts an issue it does not by that act alone violate one of the constitutional constraints. That is to say, when it denies to the lower federal courts and to the Supreme Court authority to hear a suit arising out of the institution of a prayer in the public schools, it does not establish a religion. The establishment clause is violated when some state or local authority imposes a prayer requirement and a state court refuses to follow Supreme Court precedent and to strike down the imposition. But just as Congress could not itself violate the establishment clause it cannot authorize the States to violate the establishment clause. The authorization when acted on in the jurisdictional context would violate the establishment clause and could not validly prevent exercise of the Supreme Court's appellate jurisdiction to give a remedy for the violation. The congressional jurisdiction provision would be void.

We think it plain that the Constitution thus bars a manipulation of the Supreme Court's appellate jurisdiction for the purpose of effecting substantive changes in constitutional law. More difficult is resolution of the issue when what Congress enacts takes from the federal and gives to the state courts jurisdiction to entertain such suits subject to Supreme Court review. Theoretically, High Court review should prevent effectuation of the forbidden constitutional change and save the statute. But it may be that the practical difficulties of Supreme Court review do not allow for adequate protection of constitutional rights under the circumstances. It may be that state legislatures would restrict state court jurisdiction and powers to afford adequate relief or to process cases that can be taken to the Supreme Court with sufficient promptness to protect rights. It may be that other unforeseen situations arise. In that eventuality, can it be doubted that serious constitutional questions would arise?

Because the policy considerations are so substantial and because the constitutional propriety of these bills is open to such serious reservations, we urge the House to adopt as the position of the Association a simple, forthright policy: to oppose the curtailment of the jurisdiction of the federal courts for the purpose of effecting constitutional change that is properly the province only of the amending process. Irrespective of the subject involved and regardless of our individual beliefs with respect to any of them, the overriding consideration is that we support the integrity and independence of federal courts, whether we agree with particular decisions or not, and that we support the integrity and inviolability of the amending process.

We ask reaffirmation of the principle that Elihu Root, leader of the American bar, enunciated in 1912. "If the people of our country yield to the impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming, we shall not be making progress, but shall be exhibiting... the lack of that self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they have struck the impulse of the moment."

In Number 78 of The Federalist, Alexander Hamilton explained that federal judges had been given the maximum degree of independence and protection possible because they had a critical function to perform. They must assure, he said, that the limitations on legislative authority are enforced. "Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

We do not believe the great rights set out in the First, Fourth, Fifth, and other provisions of the Constitution "amount to nothing." We deem it critical to their continued meaningfulness that these bills under consideration and others like them be defeated.

Respectfully submitted

Richard R. Bostwick
W. Gibson Harris
Elaine R. Jones
Johnny H. Killian
Hon. Harry Phillips
Hon. H. Barefoot Sanders
Irving R. Segal
Benjamin L. Zelenko
Edward I. Cutler, Chairman

August 1981

PREPARED STATEMENT OF ROBERT C. ECKHARDT

Let us assume, arguendo, that Congress could withdraw from the Federal Courts the power to use a remedy to enforce a constitutional right, which remedy they have found necessary in the expiditious protection of that right.

Let us admit, for the sake of argument, that Congress may leave in the hands of the courts most experienced in dealing with federal law jurisdiction to enunciate principles and declare that they be observed, but take away jurisdiction to mandate the manner of their observance if such includes bussing. Let us postulate that this may be done, improvident as it may be.

I think tampering with jurisdiction, a procedural tactic, to obtain a substantive result is a very serious matter indeed - one to be assiduously avoided. But set that aside. Assume that it can be done so long as some judicial authority, acting persuant to the commands of federal law and the Constitution has jurisdiction over the whole body of federal law.

You may distribute the judicial authority of the United States in a different way than it is now distributed, but you may not thus diminish it. True, Congress can diminish federal statutory law by repealing or amending it. But it cannot repeal or amend Constitutional law.

That which gives the constitutional mandate teeth and sinew is part and parcel of constitutional law. It must, under Article III be given to some judicial authority which acts pursuant to federal law to apply and enforce it.

Article III, section 2 says that "The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution..." Article VI provides that "This Constitution and the Laws of the United States which shall be made in Persuance thereof, and all Treaties made...shall be the supreme law of the land."

Thus the total judicial authority must be somewhere assigned, and this includes, not just a pious declaration of principles, but the process determined necessary to put these principles in effect.

This bill must be measured against these standards.

Would you agree with me so far?

If I am correct about this, the bill is unconstitutional, because, considered with other federal law, it does not leave that power intact.

Under Title 28 U.S.C. Sec. 1441 it is provided that any civil action brought in a state court of which the district courts of the United States have original jurisdiction maybe removed to the district court of the United States. Cases arising under federal laws pursuant to the Commerce Clause, under 28 U.S.C.A. 1337, and cases like the civil rights and school segregation cases arising under 28 U.S.C.A. 1343 are thus cases in which the district courts of the United States have original jurisdiction. Thus, they are removable under 28 U.S.C. 1441. Whether or not a specific remedy available to the State court is allowed in the Federal court, the fact that the matter was within the jurisdiction of the Federal Court makes the right to removal absolute.

This point has been clearly decided in Avco Corp. v. Aero 735, 390 U.S. 557, 88 Sup. Ct. 1235 (1968). There the petitioner filed a suit in the State Court in Tennessee to enjoin the union from striking at petitioners plant in violation of a no-strike clause. The union moved in the Federal District Court for removal of the case, and remand was denied. The Federal Court granted the union's motion to dissolve the injunction on grounds that the action arose under Section 301 of the National Labor Relations Act and was controlled by a federal substantive law even though it was brought in a state court. The Court held that it lacked general equity power to grant the particular relief, injunction, because of the Norris LaGuardia Act, but the "breadth or narrowness of the relief which may be granted under federal law in Sec. 301 cases is a distinct question from whether the Court has jurisdiction over the parties and the subject matter."

Therefore, if the East Bill were passed, because of the effect of the removal statutes, no court would have jurisdiction to "issue any directive requiring the assignment of transportation or transportation of any student to a public elementary or secondary school operated by a state or local educational agency for the purpose of altering the racial or ethnic composition of the student body at that school", to close the school and transfer students elsewhere, or, in certain other ways, bring about desegregation in the school district.

Under prior federal decisions, the courts have made these processes an intergral and necessary part of protecting minorities constitutional rights under Brown v. Board of Education. If jurisdiction remained in the state courts, they would be bound just like federal courts to enforce desegregation.

Even if a desegregation case were filed in a state court, enactment of the East Bill would invite the defendants in every case to remove to federal court and then move to dismiss.

PREPARED STATEMENT OF J. HAROLD FLANNERY

Mr. Chairman and members of the Committee: my name is J. Harold Flannery and I am a practicing lawyer in Boston, Massachusetts. I welcome and appreciate this opportunity to speak with the subcommittee about this important proposed legislation.

Perhaps a further word of introduction would be appropriate. I served from 1958 until 1970 under two Democratic and two Republican administrations as a trial attorney in the Civil Rights Division of the United States Department of Justice, and during the nineteen-sixties I tried many school desegregation cases, including the Government's first Northern one. Since that time I have represented school boards, as well as private plaintiffs, in school cases, and I have been a desegregation consultant to various state boards of education, including Illinois, Massachusetts, Minnesota and Nevada, and to the Office for Civil Rights of HEW. During the early nineteen-seventies I served as Deputy Director of the Center for Law and Education at Harvard University.

I do not appear today on behalf of a client, so I have no monetary ax to grind. Rather, it is my hope that my somewhat broader-than-usual perspective on these important questions will assist the Committee in its deliberations.*

S. 1647, as I read it, identifies various evils of federally mandated public elementary and secondary school desegregation, and it seeks to remedy them by eliminating the jurisdiction of the lower federal courts to order such desegregation. I believe that the bill is unconstitutional and unwise in a number of respects, but I shall limit this presentation to three points: first, this legislation would radically alter institutions that have served us well, by and large, for almost 200 years; second, whether it would accomplish its objective is questionable, but its unintended harmful effects would be inevitable; and third, while these hearings may develop evidence supportive of the bill's findings, I believe that they are largely unsupported now, and I question whether any findings can support a near-denial of Constitution-based rights by jurisdictional means. I shall return to this latter point, but I want to underscore it here. The bill is a paradox: in many cases, pupil reassignments are necessary to constitutionally-required effective desegregation; therefore, the bill is unconstitutional to the extent that it defeats that remedy where it is required, but where the bill yields to the Constitution -- as it must if lesser remedies fail, it will be an ineffective empty gesture. And the Congress that raises and then disappoints the expectations of those who oppose busing, which has happened in the past, will be viewed as cynical and political in the pejorative sense.*

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* In preparing the following comments I wish to acknowledge the valuable assistance of my colleague, Jeffrey B. Abramson. I have also had the benefit of a very thoughtful article, addressed to other similar pending legislation, by Professor Laurence H. Tribe, which is soon to appear in the Harvard Civil Rights-Civil Liberties Law Review. Ultimately, of course, the views expressed herein are my own.

Supreme Court adjudications of rights and remedies that are Constitution-based can be, and have been, overruled by the process of amending the Constitution. The 11th, 14th and 16th Amendments (having to do, respectively, with suits by citizens of one state against another state, the citizenship of sometime slaves, and the federal income tax) are examples of that process. It is equally clear, however, that the Constitution is the "supreme law" of the land and its provisions cannot be overruled by a statute of the Congress. Moreover, it is also established that the Fifth Amendment to the Constitution prohibits indirect, as well as direct, nullification of rights secured by the Constitution. For example, a statute saying that no court shall have jurisdiction to protect freedom of religion would be unconstitutional as a nullification of the 1st Amendment, and many authorities argue that it would also flout our traditional separation of powers in a larger or more fundamental constitutional sense.

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* I understand Senator East's bill to disapprove pupil reassignment orders by the lower federal courts even where such reassignments are necessary to remedy official segregation and its effects. The bill does not quite say so, however, and if the bill merely forbids reassignments for the purpose of "racial balancing," it is redundant. Previous legislation and court decisions have established and confirmed that principle.

The original Brown decision held official public school segregation to be unconstitutional. After more than a school generation of unofficial but actual continued segregation, the Supreme Court indicated in 1968, and then decided in 1971, that actual desegregation, as practicable, is the constitutional right of students -- and the constitutional obligation of school systems -- found to be illegally segregated. Therefore, any statute dealing with school desegregation remedies may not deny or nullify, directly or indirectly, the right of students to the remedy of actual desegregation where it is constitutionally required.

The foregoing principles are the basis for my concern that S. 1647 may be read by many to promise more than it can deliver, and the disappointment among some who oppose mandatory desegregation may be bitter.

Perhaps because the drafters were cognizant of the problems, a closer reading of the bill discloses that it will impair or inconvenience the enjoyment of the right in question, but it will not deny or nullify it. The disapproved remedies -- pupil and teacher reassignments, with or without transportation as prescribed by local law -- will continue to be required by the courts of 50 states (plus, presumably, the Court of Appeals for the District of Columbia) and the Supreme Court. And that brings me to my second point: if the bill's constitutionality is defended on the ground that only procedure, not substance, has been changed, the principal effect will be to add new problems to the present ones.

The state courts will continue to hear and decide school cases, subject to uniformizing Supreme Court review (just as at present), and the lower federal courts will also continue to hear and decide school cases, subject to Supreme Court review (just as at present), except that one current remedy will henceforth be federally available only from the Supreme Court. Whether the lower federal courts should be, or constitutionally can be, reduced in one class of cases to rendering opinions that are largely advisory is questionable, but the practical effect of the bill will be to make routine and automatic Supreme Court review that is already available to the litigants with the concurrence of the

Court. The lower federal courts will presumably function as fact-finding masters or magistrates, and the already-burdened Supreme Court (which reversed the Court of Appeals in the Charlotte-Mecklenburg case and reinstated the District Court's desegregation order) will issue desegregation injunctions which, as matters now stand, they consider only upon review. And if the lower courts are truly without jurisdiction to evaluate pupil assignments and reassignments, perhaps motions for desegregation plan modifications, supplemental relief and other enforcement will be heard de novo in the Supreme Court. At best, such disputes will apparently be heard initially in the lower courts but remedially decided in the Supreme Court.

Subparagraph (a)(3) of the bill, which appears to be addressed to certain faculty and staff school-desegregation-case holdings (without any underlying finding in Section 2), presents many of the foregoing problems and adds new ones of its own. The obligation of school authorities to operate systems that are wholly free from official segregation and discrimination and their effects is a constitutional one to which local contractual arrangements must yield. Moreover, current federal statutes, including Titles VI and VII of the Civil Rights Act of 1964, forbid faculty segregation by contract or otherwise, and they require desegregative reassignments where necessary to eliminate the racial identifiability of schools. As noted above, a statute cannot amend the Constitution, so that subsection -- while it will cause many of the jurisdictional problems noted above -- will not insulate faculty contracts from state and Supreme Court judicial review, nor is it likely to be construed as an intended repeal of the federal and state laws explicitly forbidding employment discrimination.

For the foregoing reasons, I suggest again that the operative provisions of the bill cannot be both constitutional and effective; indeed, I believe that they will prove, after some period of jurisdictional turmoil, to be both ineffective and unconstitutional. Before I turn to some brief thoughts about the legislative findings, I want to call your attention to two ironies in the proposal that I assume are unintended.

School desegregation litigation in the South is largely, although not entirely, by now a page of history. Plans are in effect (and the bill contains no provision for retroactive resegregation), and if the bill does inhibit school desegregation cases and remedies, its effect will be greater in the North, where most of the litigation began after the Supreme Court's Denver decision less than a decade ago. In that event, Senator Stennis's criticism of the 1960's, that the Constitution was being applied to the South but not to the North, will be sadly valid.

In addition, the balance of authority among the three branches of our Government, which safeguards each branch from encroachment by another, is delicate and fragile. To the extent that this legislation is read as an assertion of constitutional supremacy by the Congress in the Judiciary's traditional sphere, I would remind the Congress, with complete deference and respect, that the sword is two-edged if not three. In our own lifetimes we have seen the federal courts turn back presidential efforts to infringe upon the powers of the Congress by taking over steel mills, impounding appropriated funds and resisting congressional subpoenas. I do not suggest that you owe the federal courts a favor; I do suggest that to distort our system of checks and balances in order to address one troublesome issue would be a dangerous and radical precedent.

Lastly, Section 2 of the bill sets forth a dozen legislative findings critical of court-ordered desegregation, while seeming to acknowledge as "compelling" the elimination of official school segregation. I am not a social scientist, and as a lawyer I respect fully the authority of the Congress to make legislative findings. However, the bill's findings are flawed, I believe, in two respects.

First, many courts in many cases have heard voluminous evidence about segregation and desegregation and their causes and effects, as have the various state legislatures and education departments that have mandated desegregation as a goal of educational policy. Opinions and points of view abound, but the hard evidence on a number of these questions is thin and inconclusive. To take one example: many thoughtful persons oppose transporting elementary-level children, yet there is substantial evidence that busing is safer than walking, particularly for younger children. Similarly, with respect to subparagraphs (2) and (6) of the findings, I believe the record establishes that the courts have distinguished carefully and conscientiously between official segregation and that which is non-governmental, and that desegregation has improved the quality of many children's education.

I do not claim to have conclusive evidence that contradicts the bill's findings. Although no one I think can deny the harmful effects to whites and blacks of hundreds of years of official segregation and discrimination, the evidence about a decade or less of desegregation is at most impressionistic, preliminary and inconclusive. The early returns are beginning to come in, however, and I urge that the Congress pause in making its findings at least long enough to consider a very recent multi-volume, over-time study of desegregation funded, according to the New York Times, by the National Institute of Education and HEW's Office of Civil Rights. That study, entitled "Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies" and administered by the Center for Education and Human Development Policy at Vanderbilt University, seems on the basis of reports of it that I have seen possibly to be at variance with some of this bill's findings, and certainly at least to bring systematic new light to these questions.

Second, Section 2 of the bill seems to make certain findings of constitutional facts as well as educational facts or social science policy. Many constitutional authorities have observed that Brown v. Board of Education is a race case, not an education case; and I take that to mean that the Court was not legislating educational policy but deciding what our Constitution requires about racial justice and public schools irrespective issues of educational betterment. If that understanding is correct, then any legislative findings contrary to that basic constitutional equation are null or void.

Surely, the Congress could not validly find that state subsidies to church schools do not aid religion. Similarly, if findings nine (9) through eleven (11) of the bill are read to contradict the constitutional right of officially segregated students to immediate desegregative reassignments (called by the Supreme Court in the Charlotte case the "greatest possible degree of actual desegregation"), they can be of no effect. Indeed, the Supreme Court held as much about finding number ten (10) in a companion to the Charlotte case (North Carolina Board of Education v. Swann, 402 U.S. 43 (1971)).

For the foregoing reasons, I oppose the adoption of S. 1647.

Senator EAST. We stand adjourned.

[Whereupon at 1:22 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

COURT-ORDERED SCHOOL BUSING

FRIDAY, OCTOBER 16, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2228, Dirksen Senate Office Building, Hon. John P. East (chairman of the subcommittee) presiding.

Present: Senators Baucus, and Heflin.

Also present: Senators Roth and Helms.

Staff present: Dr. James McClellan, chief counsel and staff director; James Sullivan, Craig Stern, amd Grover Rees III, counsels; Debra Freshwater, chief clerk; Sharon Sheets, research assistant; and Ken Kay, minority staff director.

OPENING STATEMENT OF SENATOR JOHN P. EAST

Senator EAST. I would like to call this session of the Separation of Powers Subcommittee to order, please, and welcome our guests, visitors, and members of the media.

I would like to make just a very brief opening comment; and then my distinguished colleague here, Senator Baucus, would like to do likewise. Then we will turn to our witnesses this morning, including two of our distinguished colleagues from the U.S. Senate, Senator Roth of Delaware and Senator Helms of North Carolina.

Just to review briefly what we have been doing in these hearings, the fundamental piece of legislation under consideration is S. 1647.[1]

We held hearings on September 30 dealing with the impact upon education and upon the community as far as mandatory busing by the lower Federal courts is concerned. On October 1, we discussed the constitutional and statutory implications of S. 1647.

Today is our final day of hearings. We will be taking up a number of dimensions of this problem here, with a diversity of perspectives, which diversity I think will give us some additional insight into the nature of this problem. We hope this diversity of perspectives will point us in the right direction or at least tell us the various things we would have to consider in any final piece of legislation.

I acknowledge at the outset of these hearings that we appreciate this is a very divisive issue and an issue over which reasonable and fair minds can disagree. I will say, as chairman of this subcommittee and as a member of the Judiciary Committee, there is a lot of interest in this particular matter; and the U.S. Congress, and the Senate in particular now, cannot escape grappling with it, however much some might wish that we could simply lay it aside and leave it untouched.

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[1] The language of bill S. 1647 was subsequently reintroduced by Senator Helms as bill S. 1743. S. 1743 then went over to the calendar under rule 14. S. 1743 and related bills can be found in the appendix.

We do hope to deal with it in as responsible and comprehensive a way as we can and ultimately let the will of the U.S. Senate and ultimately the U.S. Congress work its way.

I do again welcome our colleagues and guests this morning and turn the floor over to our very distinguished colleague and ranking minority member of the subcommittee, Senator Max Baucus of Montana.

STATEMENT OF SENATOR MAX BAUCUS

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Chairman, today we conclude our hearings on legislation to prohibit the Federal courts from issuing busing orders.

I continue to remain convinced that the issue before this subcommittee is not the merits of busing; rather, the issue is whether Congress can or should prevent a court from issuing a busing order where that is the only way that the affected individuals can have their constitutional rights vindicated. That, I believe, is the real issue that this bill presents.

I remain convinced that the Congress has a role to play in fashioning judicial remedies, including the remedy of busing. But I do not believe that Congress has the power to preclude the use of a remedy if that is the only remedy that will insure an individual his or her constitutional rights.

This morning we will hear from Assistant Attorney General Reynolds of the civil division. I look forward to his testimony, and I am hopeful that he, on behalf of the Department, will assist us in determining the wisdom and the constitutionality of the bill before us.

In addition, this bill presents us with 11 proposed findings on the state of the law and the effects of busing. I continue to believe it is essential that this subcommittee only approve those findings that are substantiated by a preponderance of the evidence.

In order to make that determination, we are privileged today to have a number of witnesses who can present us with their firsthand testimony on the impact of desegregation in their communities.

We will be hearing about the experiences of Charlotte, N.C.; Wilmington, Del.; Louisville, Ky.; Seattle, Wash.; Little Rock, Ark.; and several other major American cities. I look forward very much to the testimony, and I know it will be helpful in determining the accuracy of the proposed findings in the bill.

In conclusion, at the end of today's hearings the subcommittee will have devoted 4 full days of hearings to this bill, including the testimony of nearly 30 witnesses. I want to compliment you, Mr. Chairman, on the thorough and exhaustive way in which you have handled these hearings. You have been more than willing to include on the panel witnesses from all sides of this issue, and I want to thank you personally for the open and even handed manner in which you have conducted these hearings.

Senator EAST. Thank you very much, Senator, for those kind words.

I would like to underscore to all witnesses the time constraints under which we are working. Senator Baucus is in a position where he must leave at 12:30, which is the timeframe in which we are operating.

We intend to allow all witnesses to be heard, but so that no one will be shortchanged I would like to remind everyone of the time constraints we have and would urge them to summarize their remarks orally, appreciating that their written remarks will be a part of the record and it will be a summarization of their positions that will be most helpful for us, allowing us time to come back in a question-and-answer dialog format.

I do welcome this morning our two distinguished colleagues from the U.S. Senate, the Honorable William Roth, Senator from Delaware; and the Honorable Jesse Helms, Senator from North Carolina.

Of course we are delighted to have here a distinguished North Carolinian, the Honorable James B. McMillan, Judge, U.S. District Court, Charlotte, N.C.

So we have two North Carolinians, which gets us off to a very good start, and one very distinguished Senator from Delaware.

Senator Roth, if you will proceed, we will see where all of this comes out.

STATEMENT OF HON. WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Thank you, Mr. Chairman and Senator Baucus. I am pleased to have this opportunity to appear here to participate in your subcommittee's hearings regarding court-ordered busing and legislation which seeks to address this issue.

As you are aware, the busing controversy has embroiled my State for a number of years. For a number of years, my distinguished colleague, who is now the ranking minority member of the Judiciary Committee, Senator Biden, and I have sought legislative action by Congress to extinguish the fires of controversy which raged over busing at a cost of wasteful energy expended both in a literal and emotional sense and return the focus of attention to the true matter of concern, which is to provide equal educational opportunity and quality education for our children. I am pleased to note the efforts of your subcommittee to accomplish this objective and am hopeful that we will see legislation enacted in this Congress as a result of these efforts.

Today I would like to address my remarks to the legislation which has been introduced, S. 1647, the Neighborhood School Transportation Relief Act of 1981, to insure equal protection of the laws as guaranteed by the 14th amendment to the Constitution of the United States and to deny the jurisdiction of the inferior Federal courts to order the assignment or transportation of students for the purpose of altering the racial or ethnic balance of the schools.

I believe that it is clear that Congress has the authority to enact this legislation from the history and precedents under article III which have to do with the creation of the lower Federal courts and the determination of their jurisdiction.

SPONSORED EARLIER LEGISLATION

In fact, I sponsored legislation in 1976, the thrust of which was in line with the legislative vehicle under consideration today. At the Constitutional Convention the framers rejected a proposal that would have required Congress to establish a Federal tribunal inferior to the Supreme Court. Instead, the convention adopted the present provision of giving Congress discretion with respect to creation of the lower Federal courts. While Congress in the Judiciary Act of 1789 created the lower courts, it did not vest them with all the jurisdiction they might have received under article III.

For example, it did not confer Federal question jurisdiction—that is, cases involving the Constitution, treaties, and laws of the United States—until 1875; and then it was coupled with jurisdictional amount limitations so that claims involving amounts below a certain value had to be brought in State court. Moreover, the practice from the beginning has been to make Federal court jurisdiction concurrent with that of State courts. As Justice Frankfurter stated in *Brown* v. *Gerdes*—321 U.S. 178, 188, 1944—concurring, "Since 1789, right derived from Federal law could be enforced in State courts unless Congress confined their enforcement to Federal court."

It is also my opinion that in limiting Federal court jurisdiction in the manner of prohibiting the assignment or transportation of students on the basis of race, the legislation in no way removes any constitutionally vested right but instead reaffirms the constitutional principle established in *Brown*, which was simply that no State may compel separation of the races in the public schools. In other words, the State may not, on the basis of a child's race or color, designate where he is to attend school.

I believe I can say that there is a universal agreement and support for the decision handed down in *Brown*. In *Brown* desegregation means the assignment of students to public schools without regard to their race. Congress itself accepted this definition in section 401 of the Civil Rights Act of 1964.

The erosion of this principle with the reliance on busing as a desegregation technique has resulted in a complete practical reversal of the right of neutral assignment to the point where assignment of students on the basis of race is mandated. This defies all logic.

That this result was hardly contemplated by the Court in 1954 and 1955 when the *Brown* decisions were announced can be seen in this quote from one of the petitioners' briefs:

> The negro children before the Court in these cases are entitled to public education on a nonsegregated basis. The only way the relief can be meaningful to them is to abolish the policy of using race as a criterion for assignment of students. Thus, the only effective decree would be one which would enjoin the use in the assignment of any pupils in the school districts involved.

The author of this statement, the lead counsel for petitioners in the case, was Thurgood Marshall. It was a memorandum brief for petitioners filed May 6, 1955, pages 10 and 11.

Furthermore, S. 1647 allows for other adequate remedies to be left to the inferior Federal courts and retains the court's authority to issue any orders or injunctions prohibiting unconstitutional State action that purposefully excludes minorities from schools or otherwise segregates the schools.

REMEDIAL ALTERNATIVES LISTED

These other remedial alternatives, which include magnet schools, voluntary transfer plans, equal funding, ancillary relief, among others, are also consistent with the guidelines established by the court in the *Brown II* decision in order to effectuate the desegregation of public education.

Given the aforementioned, I believe that legislation can and should be enacted by Congress which will put an end to the forced busing of our school children. It is essential that Congress reaffirm the decision of the *Brown* case and get to the matter at hand, which is to provide an educational solution instead of the forced social integration policy which the courts have repeatedly foisted upon the public.

I would ask what educational objectives are served by busing and would answer my own question in part by submitting that racial composition and numerical balances do nothing to enhance educational opportunity and quality education for our children.

Mr. Chairman, before I complete my testimony today I would like to raise one concern of mine in relation to S. 1647. This concern is that there is no express provision for retroactivity. Without specific language which addresses existing orders, I fear that the prospective nature of legislation would preclude the consideration of areas where existing orders are in effect. This of course is of particular concern for our situation in Delaware. I would not support legislation which does not provide relief to Delaware and other States which are under current busing orders and which remain "open" on the docket of the trial court.

On this point, I am submitting an informal opinion from the office of the attorney general of the State of Delaware. Hence it is important that your subcommittee adopt language that will insure the legislation applies to all school districts, retroactively or prospectively.

I would also urge the subcommittee to adopt language that will terminate the courts' jurisdiction after a fixed number of years. Too many courts retain jurisdiction indefinitely, when the public policy should be to return control of schools to local authorities and parents as rapidly as possible.

Mr. Chairman, I compliment you for holding these hearings and addressing the problem of busing. I restate that busing is a bankrupt policy that does not have the support of parents, black or white. Again, I thank you for the opportunity of being here today and look forward to working with you to resolve the problem of court-ordered busing.

[Material referred to above follows:]

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
STATE OFFICE BUILDING
820 N. FRENCH STREET, 8TH FLOOR
WILMINGTON, DELAWARE 19801

RICHARD S. GEBELEIN
ATTORNEY GENERAL

DIRECT DIAL:
571-2524

October 14, 1981

Honorable William V. Roth, Jr.
United States Senator
3021 J. Caleb Boggs Federal Building
Wilmington, Delaware 19801

Re: Applicability of Proposed Federal Pupil
Assignment and Transportation Legislation

Dear Senator Roth:

In recent correspondence, you have asked Attorney General Richard S. Gebelein what impact, if any, two proposed pieces of federal legislation would have on the status of elementary and secondary desegregation in northern Delaware. The State Solicitor has asked me to concentrate on this matter. I have served as general counsel to the State Board of Education for three years.

You originally forwarded two pieces of legislation to Mr. Gebelein's office. One piece indicates its introduction by Senator Hatch; the other by Senator East. During recent conversations with Mr. Hayward of your staff, we have been advised to focus our attention on Senator East's bill. A copy of the bill is attached for your reference. Specifically, you have asked what effect, if any, the East bill would have on the judicially decreed desegregation remedy presently extant in northern New Castle County, Delaware. This is our response.*

Before discussing the relative inapplicability of the East bill to Delaware, it is important to distinguish the different types of de jure desegregation litigation. The law suits are broken out here depending on their status in the federal courts.

The first category of de jure desegregation cases are those which have been fully litigated and are not closed. By that is meant that a federal court has found a constitutional violation and has imposed a "remedy" (often including new transportation and attendance patterns.) By the term "closed" is also meant that all appeals have been exhausted and the District Court has now removed the case from the active docket of the particular jurisdiction.

The second category of de jure cases are those which have been fully litigated, appeals have been exhausted, but which remain "open" on the docket of the trial court. Some District Courts have sua sponte left de jure desegregation cases open on their dockets for the purpose of monitoring the "remedy" which has been imposed. Other federal courts have kept such cases open at the urging of prevailing plaintiffs. Delaware falls into this second category. Judge Schwartz has determined to continue jurisdiction over desegregation in northern Delaware until a "unitary system" of schools has been achieved.

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*This correspondence does not necessarily reflect the opinion of the Attorney General or the State Board of Education.

I will return to Delaware and the East bill below. However, in order to be complete, the remaining types of de jure cases ought to be described. The third type of case is that in which a constitutional Fourteenth Amendment violation has been found but the court has not yet determined what type of remedy should be imposed to undo the constitutional wrong and how far-reaching that remedy should be.

The fourth type of case is that in which a complaint has been filed, but the court has found neither a constitutional violation nor a remedy at the time of passage of any new federal legislation. Finally, a fifth type of case is prospective in nature only. In other words, no formal complaint has yet been filed with any court.

The operative provisions of the East bill suggest that it could only effectively impact on the third, fourth and fifth types of de jure cases described above. It speaks in terms of future jurisdictional matters and makes no provision for reviewing, amending, reversing or otherwise altering "remedy" orders which have been put in place and from which appeals have been exhausted. East Bill at §2282(a). Further, it would be legally impossible to simply add language to the East bill which would retroactively void the jurisdiction that courts have exercised for the past ten years during which the most controversial remedy decrees have been handed down by the federal courts.

The problem is thus one of bringing the thrust of the East bill's proposed Congressional findings and purposes to bear on the first two categories of de jure cases discussed above. Specifically, Delaware's interest in any legislation such as the bills of Senators East and Hatch is to see that cases still open for any reason on the docket of the relevant court are fully reopened and reconsidered pursuant to new legislative standards.

The bill of Senator Hatch makes some provision for cases such as the Evans case in Delaware. Section 6 of the Hatch bill permits any individual, school board, or school authority to seek judicial relief from any pupil assignment or transportation remedy order handed down prior to the effective date of the legislation. The court must make five findings* based on clear and convincing evidence. If the court is unable to make the five findings required in the Hatch bill, persons seeking relief would apparently be entitled to relief consistent with other provisions in the Hatch legislation. Those provisions prohibit orders requiring the assignment or transportation of pupils based on race, color or national origin.

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*The five findings are as follows:

1. School closings, boundaries and other acts of governments have caused and will continue to cause pupils to be excluded based on race.
2. Circumstances have not changed since the original order was issued.
3. No other remedy would preclude the de jure segregation.
4. The original order was limited only to those pupil assignments and transportation arrangements which were necessary to eliminate the de jure segregation.
5. The "economic, social and educational" benefits of the original remedy order outweigh the economic, social and educational costs.

The East bill clearly needs similar language in order to be made applicable to desegregation in northern Delaware. Without an effective "reopener" clause, those areas throughout the country which labor under outstanding remedy decrees will be required to continue to do so.

Assuming arguendo that the five separate findings required in the Hatch bill or other similar findings were required to be made by the federal court in Delaware,* it would appear that a petitioner would have a fair opportunity to prevail. A new court vested with jurisdiction to make the findings would have the opportunity to take a fresh look at whether the original alleged constitutional violation was a deliberate, de jure act of segregation. A new court would also be vested with the authority to determine whether the original remedy went beyond what was necessary to right the constitutional wrong. Some observers of the Evans case have urged that these two crucial determinations be re-examined. A new judicial review would also be required to balance economic, social and educational benefits of the remedy versus its costs. A balance of those factors in the Delaware situation by a neutral fact-finder would be of interest.

This is not to suggest that Senator Hatch has developed the best possible scheme by which prior remedy orders should be reconsidered. His bill, however, more aptly addresses the Delaware situation than the East legislation. In essence, for any bill to impact on the Delaware case, it must contain language which mandates that cases be reopened, remedies be reviewed, and changing circumstances be closely examined. Actual impact would likely not be had in Delaware until any legislation such as that discussed here were tested in the courts. Constitutional challenges to new legislation in this area appear inevitable.

I hope that this letter is of some assistance to you. I would be happy to answer any questions you have concerning this correspondence. If I may assist in any drafting which you deem appropriate, please do not hesitate to contact me.

Sincerely,

Roger A. Akin

Roger A. Akin
Deputy Attorney General

cc: Richard S. Gebelein, Attorney General

Encl.

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*The Hatch bill would vest jurisdiction for the new hearing in any federal court. Consideration should be given in new legislation to placing jurisdiction in a court other than that which handed down the original remedial decree. Perhaps the three-judge federal court statute could be amended to add this jurisdiction where a de jure remedy was imposed by a single judge.

[Editor's Note: The October 14, 1981 letter from the Deputy Attorney General of Delaware addresses the text of S. 1647 (the East Bill) before changes were made in the markup of the Separation of Powers Subcommittee on November 17, 1981.]

Senator Roth, as I understand your schedule this morning, you need to leave promptly?

Senator ROTH. That is correct, Mr. Chairman.

Senator EAST. So you cannot stay for questions then?

Senator ROTH. Not at this time. I would be happy to answer them in writing.

Senator EAST. Fine. Thank you, we thank you for coming.

Senator ROTH. Thank you, Mr. Chairman.

[The prepared statement of Senator Roth follows:]

PREPARED STATEMENT OF SENATOR ROTH

Mr. Chairman, I appreciate the opportunity to appear here to participate in your subcommittee's hearings regarding court ordered busing and legislation which seeks to address this issue.

As you are aware the busing controversy has embroiled my State for a number of years. For a number of years my distinguished colleague who is now the ranking minority member of the Judiciary Committee, Senator Biden, and I have sought legislative action by Congress to extinguish the fires of controversy which raged over busing at a cost of wasted energy expended both in a literal and emotional sense and return the focus of attention to the true matter of concern which is to provide equal educational opportunity and quality education for our children. I am pleased to note the efforts of your subcommittee to accomplish this objective and am hopeful that we will see legislation enacted in this Congress as a result of these efforts.

Today, I would like to address my remarks to the legislation which has been introduced, S. 1647, the Neighborhood School Transportation Relief Act of 1981, to insure equal protection of the laws as guaranteed by the fourteenth amendment to the Constitution of the United States and to deny the jurisdiction of the inferior Federal courts to order the assignment or transportation of students for the purpose of altering the racial or ethnic balance of the schools:

I believe that it is clear that Congress has the authority to enact this legislation from the history and precedents under article III which have to do with the creation of the lower Federal courts and the determination of their jurisdiction. In fact, I sponsored legislation in 1976, the thrust of which was in line with the legislative vehicle under consideration today. At the Constitutional Convention, the framers rejected a proposal that would have required Congress to establish a Federal tribunal inferior to the Supreme Court. Instead, the Convention adopted the present provision of giving Congress discretion with respect to creation of the lower Federal courts. And while Congress in the Judiciary Act of 1789 created the lower courts, it did not vest them with all the jurisdiction they might have received under article III. For example, it did not confer "Federal question" jurisdiction—that is cases involving the Constitution, treaties, and laws of the United States until 1875, and then it was coupled with jurisdictional amount limitations so that claims involving amounts below a certain value had to be brought in State court. Moreover, the practice from the beginning has been to make Federal court jurisdiction concurrent with that of State courts. As Justice Frankfurter stated in *Brown* v. *Gerdes,* 321 U.S. 178, 188 (1944) concurring:" Since 1789, right derived from Federal law could be enforced in State courts unless Congress confined their enforcement to Federal court."

It is also my opinion that in limiting Federal court jurisdiction in the manner of prohibiting the assignment or transportation of students on the basis of race, the legislation in no way removes any constitutionally vested right, but instead reaffirms the constitutional principal established in *Brown* which was simply that no State may compel separation of the races in the public schools. In other words, the State, may not, on the basis of a child's race or color, designate where he is to attend school. I believe I can say that there is universal agreement and support for the decision handed down in *Brown.* In *Brown* desegregation means the assignment of students to public schools without regard to their race: Congress itself accepted this definition in section 401 of the Civil Rights Act of 1964. The erosion of this principle with the reliance on busing as a desegregation technique has resulted in a complete practical reversal of the right of neutral assignment to the point where assignment of students on the basis of race is mandated: This defies all logic. That this result was hardly contemplated by the Court in 1954 and 1955 when the *Brown* decisions were announced can be seen in this quote from one of the petitioners' briefs "The Negro children before the Court in these cases are entitled to public education on a non-segregated basis. The only way the relief can be meaningful to them is to abolish the policy of using race as a criterion for assignment of students. Thus, the only effective decree would be one which would enjoin the use in the assignment of any pupils in the school districts involved." The author of this statement, the lead counsel for petitioners in the case was Thurgood Marshall. (Memorandum brief for petitioners filed May 6, 1955 at pages 10–11).

Furthermore, S. 1647 allows for other adequate remedies to be left to the inferior Federal courts and retains the Court's authority to issue any orders or injunctions prohibiting unconstitutional State action that purposefully excludes minorities from schools or otherwise segregated the schools. These other remedial alternatives which include magnet schools, voluntary transfer plans, equal funding, ancilliary relief, among others, are also consistent with the guidelines established by the Court in the *Brown II* decision, in order to effectuate the desegregation of public education.

Given the aforementioned, I believe that legislation can and should be enacted by Congress which will put an end to the forced busing of our school children. It is essential that Congress reaffirm the decision of the *Brown* case and get to the matter at hand which is to provide an educational solution instead of the forced social integration policy which the courts have repeatedly foisted upon the public. I would ask what educational objectives are served by busing and would answer my own question in part by submitting that racial composition and numerical balances do nothing to enhance educational opportunity and quality education for our children.

Mr. Chairman, before I complete my testimony today, I would like to raise one concern of mine in relation to S. 1647. This concern is that there is no express provision for retroactivity. Without specific language which addresses existing orders, I fear that the prospective nature of legislation would preclude the consideration of areas where existing orders are in effect. This, of course, is of particular concern for our situation in Delaware.

I would not support legislation which does not provide relief to Delaware and other States which are under current busing orders and which remain "open" on the docket of the trial court. On this point, I am submitting an informal opinion from the office of the attorney general of the State of Delaware. Hence, it is important that your subcommittee adopt language that will insure the legislation applies to all school districts, retroactively or prospectively. I would also urge the committee to adopt language that will terminate the Courts' jurisdiction after a fixed number of years. Too many courts retain jurisdiction indefinitely, when the public policy should be to return control of schools to local authorities and parents as rapidly as possible.

Mr. Chairman, I compliment you for holding these hearings and addressing the problem of busing. I restate that busing is a bankrupt policy that does not have the support of parents, black or white.

Again, I thank you for the opportunity to appear today and look forward to working with you to resolve the problem of court ordered busing in all school districts.

Senator EAST. Senator Helms?

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HELMS. Mr. Chairman and distinguished members of the subcommittee, I am grateful for the privilege and opportunity to appear this morning to offer my comments on a subject that has been of great concern to me for many years and, in fact, to the vast majority of the American people. If there is any doubt about that, look at the polls. Forced busing has had a devastating impact on the people of my State of all races and has adversely affected our Nation as a whole.

Let me quote a pretty good constitutional lawyer for whom I have the greatest respect, a former colleague of many of us. His name is Sam J. Ervin, Jr. Senator Ervin said:

> I can think of no group of people who have stood in greater need of relief from Government tyranny than the thousands of innocent little schoolchildren who are being bused to schools many miles away from their neighborhoods in order to

satisfy the social theories of Federal bureaucrats and to comply with constitutionally unsound Federal court orders.

Mr. Chairman, any way you turn it, busing is a bad proposition when it is imposed with Government force. The economic cost of forced busing has been astronomically high, but the human cost in terms of the anguish of both parents and schoolchildren all across this land, irrespective of geography, has been equally high.

MISCONCEPTIONS, UNTESTED HYPOTHESES UNDERLIE BUSING THEORY

The practice of forced busing which has been imposed on our people originated in the main from a notion that social engineering techniques could remedy assumed problems. The practice was based upon a number of misconceptions and untested hypotheses which almost two decades ago the great majority of the American people knew intuitively, if the social engineers did not, was simply against commonsense.

In 1966 Prof. James Coleman prepared a report entitled "Equality of Education Opportunity." This report concluded that forced integration of schools would automatically improve the educational achievement of black children. The report became the illusory intellectual foundation for many of the HEW-ordered and court-ordered busing programs throughout this Nation. A decade later, after intensive research and analysis on the effects of forced busing, this very same Professor Coleman concluded a second report, which he called "School Desegregation and City-Suburban Relations."

Mr. Chairman, the findings in Professor Coleman's report—and bear in mind, he had been very much in favor of forced busing at the outset—refuted the assumptions and the untested hypotheses which led to the tragic practice of forced busing in the first place.

Who can say that Sam Ervin was wrong? Certainly this Senator from North Carolina does not.

In his second report, Professor Coleman concluded that the major assumptions about segregation and integration "have finally been shown to be incorrect." This was the man, Mr. Chairman, who 10 years earlier had advocated forced busing. Professor Coleman concluded in this fashion: "First, that eliminating unconstitutional 'official' segregation through the courts will not eliminate most of the segregation that these areas exhibit; second, that integration would not automatically improve educational achievement of black children; and, third, that busing orders would not create instant racial balance."

Those are not my words, Mr. Chairman. Those are the words of Professor Coleman whose conclusions 10 years earlier had been diametrically opposite. He learned a little bit in a decade, and I pray that some of those who would continue to impose forced busing will now learn a little bit. Professor Coleman also concluded, and I am quoting him again: "There are extensive losses of white students from large central cities when desegregation occurs in those cities." It was just as certain to happen, Mr. Chairman, as the night following the day.

Mr. Chairman, forced busing has cost the taxpayers of this land enormous sums of unnecessary dollars. With the subcommittee's indulgence, let me offer some examples from the State of North Carolina to illustrate the extent of the waste involved in forced busing. Needless to say, gasoline consumption involved in this forced busing tragedy is substantial. Based on a study of gasoline use for busing in several of the major metropolitan areas in the State of North Carolina, the hard statistics reveal that the use of gasoline has more than doubled wherever widespread busing has been introduced under pressure from HEW guidelines or court orders. Charlotte-Mecklenburg, the largest city in my State—the Charlotte-Mecklenburg school system used 478,343 gallons of gasoline in 1968–69 to travel 1,908,841 miles. That was in the 1968–69 school year, I would emphasize.

ENORMOUS COST INVOLVED

In April 1971 the Supreme Court affirmed a busing plan in the case known as *Swann* v. *Charlotte-Mecklenburg County Board of Education*. What happened, Mr. Chairman? In 1971–72 Charlotte-Mecklenburg used 865,733 gallons of gasoline to travel 3,914,215 miles. In the 1977–78 school year Charlotte-Mecklenburg used 1,119,956 gallons to travel 5,954,587 miles. The following year, 1979–80, Charlotte-Mecklenburg used 1,248,108 gallons to travel 6,355,638 miles. In the most recent figures I have, for the year 1980–81, Charlotte-Mecklenburg used approximately 1,312,071 gallons to travel approximately 6,660,762 miles.

This is one county in one State. Compare that figure, if you will, Mr. Chairman and members of the subcommittee, with preforced busing—478,343 gallons of gasoline to travel 1,908,841 miles.

But this is not the whole story by any means. These figures do not, for example, include the miles traveled nor the gas consumed by the 50 additional service vehicles used to bus a substantial number of students. The cost of gasoline alone to taxpayers rose from $47,488 in 1969–70, to $456,718 in 1978–79, to $1,044,889 in 1979–80, to about $1,438,456 in 1980–81. Of course the cost of gasoline has increased, but it has not increased thirtyfold. But the cost of operating these buses for gasoline alone, Mr. Chairman, has increased almost thirtyfold since forced busing began in that county.

I might mention that one of the Charlotte newspapers reported that one child was bused from one end of the county to the other alone in the vehicle to satisfy the whim and caprice of HEW and the Federal court. He had a private chauffeur and a private vehicle to drive him from one end of the county to the other. If that makes sense to this subcommittee, I want you to explain it to me. More figures—I hate to burden the subcommittee with them, but I think it is essential to look at them.

In the year 1969–70 my home town, the city of Raleigh, and Wake County, used 332,855 gallons of gasoline to travel 1,676,925 miles. That was 1969–70, I would emphasize. In 1977–78, 999,123 gallons were used to travel 4,532,095 miles. The following year, 1979–80 school year, 1,112,896 gallons were used to travel 5,283,487 miles. I have the figures all the way up to date, but I will not burden the subcommittee with a recitation of them. I am going to ask the unanimous consent of this distinguished subcommittee that a complete text of my statement be included in the record.

Winston-Salem, another excellent community, one of our larger cities, in 1969–70, Mr. Chairman, used 305,307 gallons of gasoline for its buses to travel 1,239,300 miles. In the 1977–78 school year, 865,757 gallons, compared with that 305,307 gallons in 1969–70, were used to travel 4,480,991 miles compared to that 1,239,300 miles that I referred to in 1969–70.

Greensboro—in 1970–71 Greensboro buses used 131,817 gallons of gasoline to travel 593,176 miles. In the 1977–78 school year, Mr. Chairman, 847,293 gallons were used to travel 4,100,110 miles.

Mr. Chairman, you may say why is the Senator from North Carolina using so many precise figures. I do it to emphasize the point that these are the exact figures as supplied to me by the school districts involved. There are obviously innumerable additional expenses above the cost of gasoline—money involving the tax funds of the working people who in poll after poll after poll have said, "We don't want it; stop it; you are ruining our schools; you are depriving us of our right to send our children to a school nearest our home."

These additional expenses include the necessity of purchasing buses that otherwise would not be needed, service vehicles, spare parts, and labor to service these vehicles, personnel costs—it is endless. And for what? For folly—demonstrable folly.

HUMAN COSTS ARE DISTRESSING

Among the human costs of forced busing there is a dimension to the problem that in the judgment of this Senator is even more serious than the tragic waste of tax dollars and the tragic waste of scarce and expensive energy. It is the distressing cost paid by the children themselves, the children who are forced to get on these buses, often before dawn in the morning.

Schoolbus accidents—of course I am referring to them—23,000 accidents in one recent year, resulting in 8,500 injuries and 185 fatal injuries.

The U.S. Department of Transportation, Mr. Chairman, has reported that in the State of North Carolina alone for the school year 1977–78 there were 1,292 schoolbus crashes in which 1,020 schoolchildren and busdrivers were injured and 263 other passengers were injured, for a total of 1,283.

That averages out, according to my calculation, to be 8.5 bus accidents a day in my State alone. It is an increase of just about 30 percent in the number of accidents and almost 50 percent in the number of injuries than before forced busing was thrust upon the people of this land.

I say this, Mr. Chairman: One crippled child and certainly one dead child is just too high a price to pay in terms of human value for a social experiment that is a demonstrable failure. It is a tragedy that the American people were ever subjected to this in the first place.

I agree with Sam Ervin, and I wish he were here this morning to add his eloquence. He is a great constitutional lawyer, and I will put him up against any judge or any other constitutional authority in this land in terms of evaluating the liberties of the American people and how they must and can be preserved.

You will hear all sorts of specious arguments, but they wither away when you look at the arithmetic and when you listen to the sound constitutional counsel of people who understand the principles of this great land.

BATTLE FOR SELF-DETERMINATION

That is why, Mr. Chairman, the battle that has been fought by many of us against forced busing over the past 10 years has really been a battle for self-determination by our people.

Do not parents have the right to choose the environment they want for their children? Do they not have a right to improve it as they perceive it to be? Do they not have a right to make the judgment of what is best for their children? They always did, until the social engineers trotted in and said, "Oh, no; we are going to tell you what to do."

Just as the parent determines what he wants for his child, so do the multitudes of parents who make their homes in neighborhoods and communities by choice, based on historic tradition. I think they have the right to determine the kind of setting for the education of their children.

I do not want to wax too philosophical, Mr. Chairman; but it seems to me that this is the essence of freedom. It is also the essence of commonsense. This, Mr. Chairman, is the heart of the matter.

Thank you very much for allowing me to appear.

Senator **East**. Thank you, Senator Helms.

I am not fully aware of what your schedule will allow you to do this morning—whether you can stay for a bit, or whether you need, as Senator Roth did, to press on. We certainly understand in either case.

Senator **Helms**. I need to meet with the majority leader about a matter of importance on the floor, but I can stay a few minutes. My meeting is at 11 o'clock.

Senator **East**. Fine. Thank you. We will make it brief then.

I would like to ask you this in terms of a remedy legislative answer that we might devise to this problem. Frankly, and I presume it is no great secret, I would agree with the thrust of your analysis. I do not think it has been a positive, constructive force in American life, either in terms of the educational impact or the community impact. And, frankly, in terms of the constitutional question, I, with you, think that Senator Ervin makes a more compelling argument than those who attempt to tease out of our Constitution some rationale for this particular practice of forced busing for the purposes of achieving racial balance.

As to a remedy to it, I gather you feel that S. 1647—at least as you see it, understand it, and have studied it over time—is probably the best single way we can go about dealing with this problem. I simply want to make sure I understand for the record that you are convinced, as a long-term careful student of this, that this is the single best legislative way.

Nothing is perfect, of course. There is always a loose end or two, always opportunities to modify or alter as our testimony unfolds in the hearings; but as of this point, on the basis of what you have seen and what you understand, you are convinced that S. 1647 is the single best legislative remedy to deal with the problem you have just defined this morning?

Senator **Helms**. Obviously, I think it is excellent inasmuch as I think I am a cosponsor of it. I believe you are going to have markup of this bill on October 23.

Senator **East**. Yes.

Senator **Helms**. I think you have done an excellent job in preparing this legislation, Mr. Chairman. I commend you for it, and so will the people.

Senator **East**. Thank you, Senator.

Senator Baucus?

Senator Baucus. Thank you, Mr. Chairman.

Senator Helms, I want to thank you very much for coming this morning. As you usual, you are very articulate and a very strong advocate.

I have several very brief questions; I know you have to leave. The first concerns local control.

ASPECT OF LOCAL CONTROL

From the tone of your statement, I clearly get the message that you believe a local community should decide its own fate and should decide what is best for its students. You feel parents should make that decision. Congress should not tell a local community what it can or cannot do, but should leave it up to the local school board and the local community.

What if a local community voluntarily implements a schoolbusing plan? That is what they want to do, and nobody told them to do it. Do you think they should be able to go ahead and do that, if that is their desire.

Senator **Helms**. Of course, Senator, your question is almost a rhetorical one. You have to exercise some care in how voluntary such an action would be.

I wish you could have known a man named Charlie Carroll. He was superintendent of public instruction in our State for many years. I shall always consider him as a statesman of education.

Charlie had not one vestige of racism about him—to the contrary—but he warned at the outset. He came to this Congress many times and appeared before committees on the House and the Senate side. He would say, "Now, look; you are walking into the swamps of disaster if you turn over the schools." And that is what we have done—turned them over to the courts and to HEW—the predecessor of whatever it is now—and the bureaucrats.

Charlie Carroll was an advocate of genuine, honest, sincere freedom of choice. Senator, I do not think there is any substitute for that.

Senator **Baucus**. The question though is: If a community voluntarily wants to implement a busing plan, should that community be allowed to do so?

Senator **Helms**. Down my way—and I do not know how it is in your great State—we have had busing plans almost as long as we have had buses. They have been busing children all these years. But that is not the problem.

The idea of saying *x* number of black students must go all the way over here to this school and *x* number of white students must go here, playing checkers with their lives—that is what I am objecting to. Of course I do not object to school boards running their own affairs.

Senator **Baucus**. I ask that question because, as you know, in some areas of the country some school boards have voluntarily implemented busing plans. They were not ordered to by a Federal court to implement a plan.

My second point concerns the prioriting of remedies to achieve desegregation. Is it your view that busing should never be imposed by a court to achieve racial balance, or is it your view that a court should try to find some other way, some less objectionable way, to achieve racial balance before finally, and hypothetically reluctantly, concluding that there is no other remedy but busing? Or is your view that they should never be able to utilize busing as a remedy even when the other remedies are shown to be ineffective?

Senator **Helms**. Senator, I sincerely believe that the social engineers and bureaucrats, some are in our courts, would be amazed if they would back off and let the good faith of the American people be implemented and get the Government out of it. I think the attitude of racial relations would be so much improved that those who have been tinkering with it would be astonished.

For my part, I do not want the Federal Government in it at all. It is not my understanding that the Federal Government built one school in North Carolina. It was done with the resources, the labors, and the sacrifices of the people of my State, until another folly called "Federal aid to education" came into the picture.

Yes, sir; I would like to leave the Federal Government out of it; and I think we would be better off.

QUESTION OF CONSTITUTIONAL RIGHTS

Senator **Baucus**. That goes to my final question, which is the proprietary of congressional attempts to eliminate the Supreme Court or lower Federal court jurisdiction in these cases. Isn't this opening up a Pandora's box and setting a precedent for congressional denial of constitutional rights by simple majority.

Shouldn't the Congress pass a constitutional amendment in this area? Why should Congress by majority rule be able to infringe on the most basic individual constitutional rights?

Senator **Helms**. I know lawyers disagree about this, but constitutional lawyers for whom I have great respect say there is not only the authority and the right but the duty of Congress to proscribe the courts, because so many of our early statesmen said that the most tyranny can come from the courts. If I infer correctly that you have doubts about the wisdom of the Congress removing the jurisdiction, particularly of lower courts, then I must respectfully disagree. I think Congress has not only the right but the duty to do it.

Senator **Baucus**. I think that with respect to lower Federal court jurisdiction Congress probably has the power, although that power, like all others is limited by other provisions of the Constitution. The essential question is whether Congress ought to exercise that power. Once we begin doing that, the more we will be tempted to limit Federal court jurisdiction in a large number of other substantive areas.

I think it would be far better for Congress to fashion a bill which lists other remedies that a court should utilize before implementing a busing plan. I think we should look at structuring the hierarchy of remedies rather than go down the slippery slope of prohibiting lower Federal court jurisdiction in every area we find a court making an unpopular or a controversial decision.

I find busing very objectionable myself; I do not like it; I do not know anybody who likes it. But if it turns out that in some circumstances or some school districts there is, in fact, no other remedy to address purposeful segregation of schools, then it is very possible that aggrieved citizens have a constitutional right to such a remedy.

Senator **Helms**. It depends of course, Senator, on who declares that no other remedy is available. This was precisely the problem in the past. The Federal Government with its bureaucracy and also with its courts has declared that there was no other remedy when, in fact, there were other remedies.

This business of limiting the jurisdiction of the court—I shall always believe that we are here to represent the people. I am not fearful in this issue or any other so directly affecting the lives and futures of our people that you cannot get 51 votes in the Senate against a bad proposition.

Senator **Baucus**. We are here to represent the people, but we are also here to uphold the Constitution, and sometimes those two charges——

Senator **Helms**. As a lawyer in North Carolina would say, "Indubitably, but—." Again it depends on whose interpretation of the Constitution you are talking about.

I have the greatest respect and affection for example for Lowell Weicker, but he is 180 degrees wrong in his interpretation of the Constitution on this question, and he has declared it on the floor of the Senate, and I have sat there in admiration of his eloquence, but he is wrong when he says that the Senate and the House of Representatives do not have the right to limit the jurisdiction of the courts. Of course we do, and of course we have the duty to do it.

Mr. Chairman, thank you very much.

Senator **Baucus**. Thank you, Senator.

Senator **East**. Thank you, Senator.

[The prepared statement, with enclosures, of Senator Helms follows:]

PREPARED STATEMENT OF SENATOR JESSE HELMS

MR. CHAIRMAN: Thank you for the opportunity to present my views on the subject which has been of great concern to me--and in fact, to the vast majority of the American people. Forced busing has had a devastating impact on the people of my own state, both white and black, and has adversely affected our great Nation as a whole. The economic costs of forced busing have been astronomically high, Mr. Chairman, but the human cost --in terms of the anguish of both parents and schoolchildren across our land -- has been equally high.

Mr. Chairman, my former colleague the Honorable Sam J. Ervin has said that,

> I can think of no group of people who have stood in greater need of relief from Government tyranny than the thousands of innocent, little schoolchildren who are being bused to schools many miles away from their neighborhoods in order to satisfy the social theories of Federal bureaucrats and to comply with constitutionally unsound Federal court orders.

Mr. Chairman, the battle that has been fought against forced busing over the last decade has really been a battle for self-determination. Parents have the right to choose the environment they want for their children, as long as they have the means to support it. And just as the parent determines what he wants for his child, so do the multitude of parents, who group themselves in neighborhoods and communities based on historic traditions, have the right to determine what kind of culture will be the setting for the education of their children. This is the real heart of the matter.

The practice of forced busing which has been imposed on our people, Mr. Chairman, originated in the main from a notion that "social engineering" techniques could remedy assumed problems. The practice was based on a number of misconceptions and untested hypotheses which, almost two decades ago, the great majority of Americans intuitively know -- if the social engineers did not -- were against common sense.

Contrary to the common sense of the American poeple, however, there arose in a number of academic circles a body of opinion which led to governmental policy formation and to judicial activism in support of the practice of forced busing. The experience of the last decade and a half, Mr. Chairman, has demonstrated the fundamental wrongness of the assumptions underlying this body of opinion and the policies to which it led.

In the "Statement of Findings and Purpose" in your bill, S. 1647, Mr. Chairman, there are twelve basic findings made. I would like to speak to these points today and share with you and the Committee evidence that I have collected over the years which substantiates these points.

Basic Assumptions Leading to the Practice of Forced Busing

In 1966, Professor James Coleman concluded a report entitled, "Equality of Education Opportunity," and it came to be known as the "Coleman Report." This report concluded that forced integration of schools would automatically improve the educational achievement of black children. The report became the illusory intellectual foundation for many of the HEW ordered and court ordered busing programs throuth the United States.

A decade later, after intensive research and analysis on the effects of forced busing, Professor Coleman wrote a second report entitled, "School Desegregation and City-Suburban Relations." I placed this report in the Congressional Record on September 27, 1978; three years ago, Mr. Chairman. The findings in this report refute the assumptions and untested hypotheses which led to the tragic practice of forced busing in the first place.

In his second report, Professor Coleman concluded that the three major assumptions about segregation and integration "have finally been shown to be incorrect." Professor Coleman first noted that,

> ... it was once assumed that elimination of school segregation due to official actions whether dual systems in the South or gerrymandering in the North, would eliminate all or nearly all, racial segregation in the schools.

Professor Coleman explained why this assumption had proven fallacious. He stated that,

> ... any knowledge of urban areas, and of the racial segregation that develops in urban areas along ethnic, income, and racial lines, leads immediately to the recognition that most segregation, whether ethnic, or class, or race, in urban areas is due to residential patterns. (author's emphasis)

Professor Coleman then drew the conclusion that,

> ... eliminating unconstitutional "official" segregation through the courts will not eliminate most of the segregation that these areas exhibit.

The second widely held assumption that Professor Coleman refuted was that integration would "automatically improve the achievement of lower class black children." Professor Coleman frankly admitted in his second report that, indeed, it was his own research "that laid the basis for this assumption." He stated that, "I among others, argued that ... integration would bring about achievement benefits." He further specifically drew attention to the fact that,

> "Arguments of this sort were used in a number of school desegregation cases, and such an argument helped Judge Roth to his decision in the Detroit case, which was later overturned by the Supreme Court.

While the Roth decision was overturned by the Supreme Court, Professor Coleman pointedly stated that,

> ... it has not worked out this way in many of the school desegregation cases since that research.

On the question of achievement, Professor Coleman concluded that,

> A review of a large number of analyses of effects of desegregation on achievement has recently been carried out, showing no overall gains. In some cases, there seem to be slight gains, in others no effect, in still others slight losses of achievement. Some of the most carefully studied cases, over a period of years, such as in Pasadena and Riverside, California, show either no achievement effects, or else losses.

Based on an extensive review of the data Professor Coleman succinctly concluded that,

> Thus, what once appeared to be fact is not known to be fiction. It is not the case that school desegregation as it has been carried out in American schools, generally brings achievement benefits to disadvantaged children....
> The implication of this recognition on achievement is that no longer should we look solely, or even primarily

> to racial balance in the schools as the solution to inequality of educational opportunity.

The third underlying assumption behind the practice of forced busing was, according to Professor Coleman,

> ... that policies of racial school desegregation could be instituted, such as a busing order to create instant racial balance, and the resulting school populations would correspond to the assignments of children to the schools -- no matter how much busing, no matter how many objections by parents, to the school assignments.

On the basis of over a decade of national experience, and on the basis of Professor Coleman's own analyses of the data from the experience, he concluded that

> It is not evident, despite the unwillingness of some researchers and others, to accept the fact that there are extensive losses of white students from large central cities when desegregation occurs in those cities.

Now Mr. Chairman, here we have the refutation of assumptions and untested hypotheses which contributed to the practice of forced busing in the United States. I am attaching the full text of Professor Coleman's second report which, as I noted earlier, I inserted into the Congressional Record three years ago, as an Appendix to my testimony here today.

Comment on the Economic Cost of Forced Busing

Mr. Chairman, forced busing has cost the taxpayers of this country enormous sums of unnecessary dollars. Let me offer some examples from the State of North Carolina go illustrate the extent of this wasteful expenditure of taxpayers' money.

Gasoline comsumption involved in school busing today is, of course substantial. Based upon a study of gasoline used for busing in several of the major metropolitan areas in the State of North Carolina, the hard statistics reveal that the use of gasoline has more that doubled wherever widespread busing has been introduced under pressure from HEW guidelines or court orders.

The Charlotte-Mecklenburg school system used 478,343 gallons of gasoline in 1968-69 to travel 1,908,842 miles. Then, in April of 1971, the Supreme Court affirmed a busing plan in the case known as Swann against Charlotte-Mecklenburg County Board of Education.

In 1971-72, Charlotte used 865,733 gallons of gasoline to travel 3,914,215 miles. In 1977-78, Charlotte used 1,119,956 gallons to travel 5,954,587 miles. In 1979-80, Charlotte used 1,248,108 gallons to travel 6,355,638 miles. In 1980-81, Charlotte used approximately 1,312,071 gallons to travel approximately 6,660,762 miles.

But, this is not even the whole story Mr. Chairman. These figures do not include the miles traveled, nor the gas consumed by the 50 additional vehicles used to bus a substantial number of students. The cost of gasoline alone to taxpayers rose from $47,488 in 1969-70 to $456,718 in 1978079 to $1,044,889 in 1979-80 to approximately $1,438,456 in 1980-81. This represents an almost thirty-fold increase in cost since court ordered busing.

In 1969-70, my hometown, the City of Raleigh and Wake County used 332,855 gallons of gasoline to travel 1,676,925 miles. In 1977-78, 999,123 gallons were used to travel 4,532,095 miles. In 1979-80, 1,112,896 gallons were used to travel 5,283,487 miles. In 1980-81, 1,219,206 gallons were used to travel 6,027,951 miles. The cost to taxpayers for gasoline alone increased during this time from $43,079 in 1969-70 to $405,928 in 1977-78 to $933,696 in 1979-80 to approximately $1,264,849 in 1980-81.

Similarly, during the 1969-79 school year, Winston-Salem used 305,307 gallons of gasoline for its buses to travel 1,239,300 miles. In 1977-78, 865,757 gallons were used to travel 4,480,991 miles. In 1979-80, 895,473 gallons were used to travel 4,649,808 miles. In 1980-81, approximately 895,630 gallons were used to travel approximately 4,651,800 miles. The cost to taxpayers also made a stunning increase from $37,089 in 1969-70 to $350,530 in 1977-78 to $686,827 in 1979-80 to approximately $913,371 in 1980-81.

In 1970-71, Greensboro buses used 131,817 gallons of gasoline to travel 593,176 miles. In 1977-78, 847,293 gallons were used to travel 4,100,110 miles. In 1979-80, 888,911 gallons were used to travel 4,449,482 miles. The cost to the taxpayers increased from approximately $20,596 in 1969-70 to $341,969 in 1977-78 to $711,002 in 1979-80.

Now Mr. Chairman, I realize that not all of this increase is attributable to unnecessary forced busing, but the fact remains that the average school bus gets a mere 5 miles to the gallon in gasoline consumption. Paul Harvey reported some time ago that we continue to waste some 342 million gallons nationally each year forcibly busing school children. Nationally, Mr. Harvey pointed out that this wastes the total output of 600 average producing oil wells per year.

I am attaching as a second Appendix to my testimony here today a Table showing the costs of busing for 1969-70, 1977-78, 1979-80 and 1980-81, in the major metropolitan areas of North Carolina.

There are of course innumerable additional expenses incurred by the taxpayers over and above the cost of gasoline. It is obvious that purchases of unnecessary buses and service vehicles must be made, additionally costs for spare parts and labor to service these vehicles are incurred, and additional personnel costs are incurred to operate these unnecessary buses and unnecessary service vehicles.

Mr. Chairman, let me turn to some remarks about the human costs of forced busing.

The Human Costs of Forced Busing

Among the human costs of forced busing, there is one dimension to the problem that is even more serious than the misguided use of tax dollars and the tragic waste of scarce energy resources. It is the distressing cost paid by the children themselves as a result of school bus accidents; 23,000 of them in one recent year --- resulting in 8,500 injuries and 185 fatal injuries.

The U.S. Department of Transportation has reported that in the State of North Carolina alone, for the school year 1977-78, there were 1,292 school bus crashes in which 1,020 school children and bus drivers were injured and 263 other passengers were injured for a total of 1,283 injuries. That average more than 8.5 bus crashes per school day. It is an increase of more than 30 per cent in the number of accidents and almost 50 per cent in the number of injuries than before wide-spread busing beyond neighborhood schools. Mr. Chairman, even one crippled or dead child is certainly far too high a price to pay in human terms for a social engineering experiment.

I spoke earlier of the mental anguish caused by the forcible transportation of young schoolchildren beyond their neighborhoods. Anguish for the parents and anguish for the little children themselves who are taken away from their young schoolmates to unfamiliar settings and unfamiliar children. Mr. Chairman, I have received thousands of letters from parents over the years on the matter of forced busing which point out their personal anguish and the consequences to their own family life of forced busing policies.

I must say, however, that the most moving letters that I have received have been from the children themselves who have been subjected to forced busing. Hundreds of these letters, Mr. Chairman, from these school children express their sadness about having to leave their friends at the neighborhood schools, leave their neighborhood family environment, leave the familiar policeman or merchant in the neighborhood. They write to me asking why Congress won't let them ride their bicycles to school anymore and why Congress has allowed them to be forced to get into buses to be hauled miles from their neighborhood and friends.

Mr. Chairman, there are of course some who will not accept the fact that there are many people in this country who oppose court-ordered busing because it is wasteful on our resources, or because it increases the risk of accident and injury to our children, or because it simply does not work. They will be quick to ascribe a sinister motive to anyone who does not share their enthusiasm for busing. I sincerely wish that these people would have seen a telecast of Black Journal several years ago on the subject of school busing.

The producer of Black Journal stated that, "there is a significant silent black majority view on busing that is virtually never heard." According to a poll of 100 black leaders selected by Black Journal, 58 per cent of those asked did not want children bused to schools outside their neighborhoods to achieve desegregation. A Lou Harris poll on the subject also taken several years ago showed that 62 per cent of black Americans opposed such busing. Asked whether busing would improve the quality of education for all students, 74 per cent of the black leaders responding to the Black Journal poll said, "no."

The program also found that there is mounting evidence questioning the effectiveness of busing. The U.S. Civil Rights Commission, in a report costing more than a million dollars, could not substantiate the success of busing for desegregation purposes. The program noted that scholars who once supported busing had, after extensive research and documentation, concluded that the practice has been a failure and has led to deterioration not only in academic achievement but also in race relations. The producer of Black Journal stated that, "Everyone agrees that the findings to support the success of busing for desegregation purposes are inconclusive." Indeed, he continued, "This is really a polite way of saying that it does not work."

Mr. Chairman, in line with the findings of Black Journal on the opinion of black leaders in these United States regarding busing, I am including as an appendix an article by Professor Thomas Sowell, a distinguished black American economist, entitled, "A Black 'Conservative' Dissents." I placed this article in the Congressional Record on December 3, 1980, almost a year ago, and it certainly presents an eloquent and frank statement by a leading black citizen of these United States.

Mr. Chairman, my former colleague, the Honorable Sam J. Ervin, has written a forceful article entitled, "Exclusion From Neighborhood Schools of Children and Their Forced Busing for Intrgration: Unconstitutional Federal Tyrannies." I am including as an appendix this fine statement.

Concluding Remarks

Mr. Chairman, within my lifetime I have seen ferocious assaults on the traditional American way of life. Assaults on the Christian faith and morals, assaults on the basic family structure, and assaults on the fundamental principle of local self-government have throughout this century been launched by the so-called intellectual community and by government itself. These so-called intellectuals, bankrolled by the giant tax-exempt foundations such as the Rockefeller Foundation and the Ford Foundation, have caused untold damage to the cultural underpinnings of our Nation and their vast social engineering schemes have brought untold anguish to our citizens.

These vast schemes of social engineering have been rationalized on the basis of secular humanism, Mr. Chairman, and have attempted to supplant that fundamental American principle of individual liberty under God. Individual initiative and self-sufficeincy have been supplanted by an insidious form of conformism and the ethical climate responsible for the Miracle of America has indeed suffered as a result.

Behind these vast schemes of social engineering lies the concept of equality as a mowing down of every person to a mass man. This concept of equality has been a pitiably corrosive force in modern history and has been propagated as a primary technique to undermine the cultural foundation of our great Republic. This concept of equality has dominated the thinking of the Supreme Court over the last thirty years, with the result that a new class of bureaucrats has been established to superinted the arrangements of this completely artifical "equality."

Mr. Chairman, the most destructive application of this fanatical pursuit of "equality" is the insistence of the federal courts on "racial balance" in the public schools. Nowhere in the Constitution will anyone find any justification for what we have witnessed over the past few years: the forcible removal of young children from the neighborhood schools to fill quotas elsewhere that are decreed by the social engineers employed by the federal government.

The sight of their children being escorted many miles from their homes by police motorcades has jolted many parents into recognizing that regardless of what plans they had for their children's education, the government and the judicial activists have plans of their own.

Mr. Chairman, as I said in my opening remarks, the battle that has been fought against forced busing over the last decade has really been a battle for self-determination. Parents have the right to choose the environment they want for their children, as long as they have the means to support it. And just as the parent determines what he wants for his child, so do the multitude of parents, who group themselves together in neighborhoods and communities based on historic traditions, have the right to determine what kind of culture will be the setting for the education of their children. That is the real heart of the matter, Mr. Chairman.

I thank you for the opportunity to be with you here today and to discuss this issue which is so important to us all and to our children and to future generations.

ENCLOSURES.

APPENDIX I

SCHOOL DESEGREGATION AND CITY-SUBURBAN RELATIONS

(By James S. Coleman)

We have now come to a point at which it is possible to be sober, straightforward, and realistic about school desegregation in major metropolitan areas. In particular, there are three major beliefs about segregation and integration that have finally been shown to be incorrect. With the destruction of these beliefs, each of which, as it played a part in social policy, employed some amount of wishful thinking, it becomes possible to point to policies that are not doomed to failure from the beginning.

It is useful to indicate just what these wrong beliefs have been, and to proceed from there.

First, it was once assumed that elimination of school segregation due to official actions, whether dual school systems in the South or gerrymandering and other school district actions in the North, would eliminate all, or nearly all, racial segregation in the schools. This romanticism may have been held by some of the Supreme Court judges in the Brown decision; but whether it was held by those jurists or not, it was widely held by others, who saw the courts' elimination of de jure segregation as identical to elimination of racial segregation in the schools. In many rural and small-town districts in the South, it was fact, not fiction. But any knowledge of urban areas, and of the residential segregation that develops in urban areas along ethnic, income, and racial lines leads immediately to the recognition that *most* segregation, whether ethnic, or class, or race, in urban areas is due to residential patterns. The Supreme Court has now recognized this as well, in recent rulings on cases in Austin, Texas and Dayton, Ohio, in which it ruled that the remedy for unconstitutional segregating actions must be limited to the extent of the violation—that those actions cannot be taken as cause for eliminating, as unconstitutional, all racial segregation in the city's schools.

The implication of this recognition—that urban populations are residentially separated by ethnicity, class, and race—is that eliminating unconstitutional "official" segregation through the courts will not eliminate most of the segregation that these areas exhibit. This is especially evident now, as white exodus to the suburbs has produced a situation in which most of the largest central-city school systems are majority black, while the surrounding ring remains predominantly white. Such segregation did not arise by official action (unless one wants to argue that the actions of the Courts in instituting racial balance orders which resulted in whites leaving the city are "official segregating acts"), yet this form of segregation is the most important form in most major metropolitan areas.

The further implication of recognizing the fiction as a fiction is that policies to reduce racial segregation in urban areas can no longer use what appeared to be the instant solution: immediate elimination of segregation through court order. Instead, more difficult actions, carried out through other agencies of government, and employing the active cooperation of blacks and whites, are necessary. But before discussing such policies, it is useful to turn to the second fiction.

Second, it was once assumed that integration—at least in majority middle-class white schools—would automatically improve the achievement of lower class black children. I hasten to say that it was research of my own doing that laid the basis for this assumption. That research, carried out under the Civil Rights Act of 1964 and completed in 1966, showed that lower class black children in majority middle class white schools achieved better on standardized tests than did other children like them in all-black schools. And it showed further that there was little decrement in the achievement of whites in integrated schools. I, among others, argued that this meant integration would bring about achievement benefits. Arguments of this sort were used in a number of school desegregation cases, and such an argument helped lead Judge Roth to his decision in the Detroit case, which was later overturned by the Supreme Court.

However, it has not worked out this way in many of the school desegregation cases since that research.

A review of a large number of analyses of effects of desegregation on achievement has recently been carried out, showing no overall gains. In some cases there seem to be slight gains, in others no effects, in still others slight losses in achievement. Some of the most carefully-studied cases, over a period of years following desegregation, such as in Pasadena and Riverside, California, show either no achievement effects, or else losses. Thus, what once appeared to be fact is now known to be fiction. It is not the case that school desegregation, as it has been carried out in American schools, generally brings achievement benefits to disadvantaged children. It is probably true that desegregation under optimal conditions will increase achievement of disadvantaged children. But that is not the point: very likely any school changes, under optimal conditions, will have this effect. What we must look for is the effect that occurs under the variety of actual conditions in which desegregation is carried out.

The implication of this recognition of the actual effects of desegregation on achievement is that no longer should we look solely, or even primarily, to racial balance in the schools as the solution to inequality of educational opportunity. That inequality of opportunity is not something to be easily overcome. If we are looking for policies to help bring about equality of educational opportunity, it is necessary to look more broadly. If we are looking for reasons to implement policies of racial balance in the schools, we must look further.

Third, it was once assumed that policies of racial school desegregation could be instituted, such as a bussing order to create instant racial balance, and the resulting school populations would correspond to the assignments of children to the schools—no matter how much bussing, no matter how many objections by parents to the school assignments. It is now evident, despite the unwillingness of some, researchers and others, to accept the fact, that there are extensive losses of white students from large central cities when desegregation occurs in those cities. To be sure, those losses are only extensive when the proportion of blacks in the city is high, or when there are predominantly white suburbs to flee to, or both. But again, this is not the point, for in all large American cities, one of these two conditions holds, and in most, both conditions hold.

There are several policy implications that follow from the recognition of this fact. One is something that should have been seen all along but can no longer be ignored. This is that a child's enrollment in a given public school is not determined by a government decision. It is a joint result of a government decision which makes school assignments, and parental decisions, whether to remain in the same residential location, whether to send their child to a private school, whether to move into one school district or another if the family is moving into a metropolitan area. The fact that the child's enrollment is a result of these two decisions operating jointly means that government policies must, to be effective, anticipate parental decisions, and obtain the active cooperation of parents in implementing school policy.

A second implication is a more powerful one. It is that no school desegregation of any appreciable degree can be carried out within a major American city, ignoring the suburbs, and be expected to remain stable. School desegregation that provides an incentive for whites to go to the suburbs—as all bussing plans to achieve integration within a city do—is inherently unstable. It is most unstable when there are extensive white suburbs and a high proportion black in the central city, a condition that is true in most large American cities. And those few large American cities without a high proportion black (like Seattle, Washington, for example), also happen to be those in which the ease of movement to the suburbs with little increase of commuting is greatest.

A third implication is that no school desegregation can be carried out, whether it includes the suburbs or not, that imposes an extreme burden upon parents or children., For if it does, resourceful parents will find a way of improving their situation. They may choose to send their children to private schools, as many have done. They may choose to move beyond the reach of the policy. For example, countywide desegregation in Louisville, Kentucky has led surrounding counties to become among the fastest growing in the nation.

The implication for positive policy is that any desegregation that is to remain stable must be a plan involving the metropolitan area as a whole, and it must be a plan in which the coercive qualities are outweighed by the attractive ones. There are many school policy makers, and many courts (still operating under the fiction that constitutionality requires racial balance) that have not recognized this, so that there are still harmful school desegregation policies being implemented in American cities. Seattle is about to enageg in a plan which will almost certainly be unstable. And only last week, the Illinois Board of Education, ignoring the suburban haven altogether, and ignoring Chicago's extensive set of Catholic schools, declared Chicago's plan for voluntary student transfers inadequate because it does not meet a State requirement that all schools in a district be within 15% of the district racial composition. But the Illinois Board is only one of many such bodies still living with the romantic fiction that a government plan of student assignment will result in enrollments matching that assignment. And like many others, the Board is living in the fiction that such actions do no harm to the long-term chances for integration in the metropolitan area.

This set of three incorrect beliefs has led to harmful and destructive school desegregation policy in the past. In the absence of these beliefs, one might believe that the ground is cut out from under school desegregation policy—that these beliefs were necessary to the development of positive policy toward reducing racial segregation in the schools. Indeed, it seems clear that this is why those beliefs have been clung to so long by so many, and why there are some who still hold them despite all evidence to the contrary. Does not the exposure of these beliefs as incorrect undercut desegregation policy generally?

But there is another set of beliefs, also incorrect, which have prevented other avenues to desegregation ploicy. Just as the former beliefs sustained policies that have been largely harmful to desegregation—and to schooling—in large metropolitan areas, this second set of beliefs has prevented the development of policies that might be helpful to desegregation and education.

First, it has been assumed that lower class black parents, when provided with opportunity for choice in education, will not use it, and if they do, will not use it wisely. This belief is in part a conceit of the educational professionals, who believe they know better than parents or children what is good for the children. In part, it is a lack of trust by black leaders of the intelligence and interest in education of their constituents. In part, it is an arrogance of the white liberal, who believes that he knows what is best for dependent or disadvantaged populations, and that although they should be given benefits, they should never be given choice.

Black families, lower class as well as middle class, have given ample evidence that this belief is wrong. On all surveys of interest in education, interest in education is higher among blacks than it is among whites. College attendance of black and white children of parents with comparable economic and educational levels shows that the black children are more likely to attend; in fact, the proportion of all 18 and 19 year olds in school is now higher among black than whites.

The evidence of active exercise of choice by black parents was even apparent in the "freedom of choice" desegregation plans initiated for a time in the South. Although there were often roadblocks put in the way of blacks wanting to choose to attend a previously white school, they did choose in large numbers to attend such schools where the plans were administered honestly.

The most explicit evidence of choice and interest, however, lies in the widespread use by central city black parents of Catholic schools. These parents, mostly non-Catholic, and mostly poor, have increasingly turned to the parochial schools as means of escape from the low educational standards, disorder, physical danger, and moral risk they see in the public school to which their child has been assigned. It is now the case that in many large cities, there is a substantial number of black parents who manage to save the few dollars a week necessary to send their children to a parochial school.

The implication of all this is that desegregation plans which depend on choices exercised by black parents will not founder because of the parents' failure to exercise that choice in an intelligent way. Thus, a variety of plans that depend on blacks exercising choice, which have been set aside by those who did not trust black parents to make wise choices, can be considered in planning school policy.

Second, there has been a belief that an all-black school is inherently bad. Thus, one criterion used by courts in determining the acceptability of desegregation plans has been whether all "racially identifiable" schools have been eliminated. Here, "racially identifiable" has always been used to mean all black schools, never all white schools.

This belief in the inherent inferiority of an all-black school has a curiously racist flavor. It originated, however, in the attempt by courts to establish a criterion for deciding whether a school district in the South that had maintained a dual system had in fact eliminated its dual system. In such a context, and in localities where there was little residential segregation, this rule of thumb was a reasonable one; the unreason came in elevating this rule of thumb criterion to a principle for judging the quality of the school. The incorrectness of this belief in the inherent inferiority of the all-black school is perhaps a corollary to the incorrectness of the belief in extensive achievement benefits of school integration. When that belief was shown to be incorrect, the incorrectness of this one almost directly follows.

I believe that one source of the error was a confusion, which still persists in the minds of many, between a school that was all black because only black students had, because of the ghetto or because of a dual system, no opportunity to choose to attend another school—a confusion of such a school with a school that was all black despite the fact that its students could choose to attend other schools. Such choice is unfortunately still rare in most cities, but a black school that thrives in its presence is obviously not an inferior school. It is a school to which parents freely choose to send their children.

There have been, and there are, all black schools that are excellent schools by any standard. Thomas Sowell, a black economist at UCLA, has identified striking examples of black high schools that graduated men and women who went on to become outstanding in the world of public affairs, the professions, and government. As another criterion, there are numerous all black elementary schools in which achievement levels are above grade level, using national norms.

The implications of recognizing the error of the belief that all-black schools are inherently inferior are important. Perhaps the most important is the recognition that in the ethnically and culturally pluralistic society of the United States, there will be schools of all sorts: schools which are racially integrated but also schools that are all black, just as there are schools that are all white. What is essential, as I indicated earlier, is that if a child is in an all black school, it should be because he wants to be there and his parents want him to be there, *not* because it is the only school that he has a reasonable chance to attend.

Third, it has been assumed that a child's rights to equal educational opportunity end at the school district boundaries. This belief is based on the long-honored practice of states in delegating to localities (cities, towns, townships, sometimes counties) the control and operation of schools in those localities. But according to the Constitution of the United States, education is a responsibility of the states; and however a state has chosen to delegate that responsibility, a child in the state has a claim upon the state to provide him with educational opportunity. What this means in particular is that the educational opportunities of a child in Detroit or Chicago should not be limited by the boundaries of Detroit or Chicago. He or any child in the metropolitan area should have the right to choose to attend any school within reasonable distance—not, of course, to escape an integrated school, but to escape the constraints on his schooling that are imposed by his residence. At least one state, Wisconsin, has recognized this. As a consequence, a child in Milwaukee, for example, can choose to attend a school outside Milwaukee, so long as he does not increase racial imbalance by doing so, and the state will compensate the district into which he transfers for the extra costs of the extra pupil. This transfer plan is not the only way such an opportunity can be realized.

The essential point is the recognition that the state has the responsibility to provide its citizens educational opportunity—and that it does not do so when it allows local districts to exclude children who do not live within their boundaries. The state, of course, has the responsibility also to the locality to foot the bill for entering students, and the locality must have the right to limit the number of students entering from outside, within reason. But this does not negate the state's responsibility to the children who reside within it.

The implications of abandoning the belief that the child's educational opportunities end at school district boundaries are, of course, profound. This does not imply abandonment of local control over the content of education, as it is now practiced. Nor does it imply that the state has the right to order a family's children to attend a school in another district. It does imply, however, a limitation on the locality's control of who else may attend schools in that locality. In particular, it implies that suburbs do not have an inherent right, except as the state gives them that right, to prevent a reasonable number of children from the city, whose educational opportunity is limited by the constraints on their place of residence, from attending school in that suburb, rather than in the city. Another way of looking at the matter is that parents who can afford to do so should have the right to choose their child's school by their choice of residence, but they should *not* have the right to exclude others by use of the school district boundaries as barriers.

What kinds of policies are feasible and desirable, once the errors of the two sets of beliefs about school desegregation are recognized?

If we once rid ourselves of all the beliefs that I have attempted to show are incorrect, what then? Does this leave any possible policies for the integration of schools, or does it leave us with no feasible policies?

The answer is that it most certainly does leave feasible policies. The policies are wholly unlike the policies of racial balance being imposed through compulsory busing in some cities, and being proposed for others. The policies would have a far higher component of parental choice than do present desegregation policies. The aims would fundamentally different: not to "eliminate segregation", but to provide opportunity to every child, and to facilitate school integration that would have long-term stability. In the aims of the policy, there would be a recognition of the diversity of schools that would result: some black, some white, some integrated. The insurance that equal opportunity was in fact being provided would not lie in an artificial numbers game with children moved like pawns on a chessboard, but in the range of opportunities available to every child.

The possible policies are based upon the interaction between government decisions and parental decisions, and not upon the assumption that goverment decisions are determining. All the policies I shall describe provide a greater degree of parental choice than is presently the case in most cities, rather than less. And the government decisions, that is the policies, are designed to make those parental choices lead not to segregated schools, but to schools that show a higher degree of integration than at present.

Because the policies I shall describe do not maintain the fiction that the segregation they are attempting to reduce is unconstitutional, and because they are not coercive, they do not elevate school district boundaries to the status of exclusion barriers. They do not, in short, treat suburbs as separate havens, protected by their boundaries, but allow parental choices to range beyond the confines imposed by their residence.

The policies I will describe are not exhaustive; rather, they illustrate how, if we abandon the fictions held for so long, a variety of policies is possible.

1. INTER-DISTRICT VOLUNTARY TRANSFERS

I indicated in my earlier remarks that Wisconsin has embarked on an extraordinarily sensible policy: to allow, not require, children in a metropolitan area to transfer not merely to another school in the district, but to another school in the metropolitan area outside their district—so long as they do not, by this move, increase the racial imbalance in the school.

In general, a policy of this sort can allow families to make their choice of school independently of their choice of residence, with reasonable transportation expenses provided. State funds would necessarily follow the child, so as not to increase the financial burden upon the receiving district. And necessarily, each school should be able to limit the number of students coming in—for example, such that no transferring child need be accepted if the proportion of his or her race has reached the average of the metropolitan area as a whole, nor if the school's capacity is exceeded. But below that point, the receiving school would not have the right of rejection.

All that is necessary for such a policy is for the state legislature to decide to do so. This is not to suggest that such a policy would be easy to institute, because suburbs—and their legislators—are likely to oppose it. For them, desegregation has been a fine policy so long as it was the other fellow's district that was being desegregated. But, as the example of Wisconsin already shows, it is not a policy impossible to pass. And as that example will show in the longer run, it is a policy that can lead to improved schools in both suburbs and city. For example, I suspect that from such a policy will emerge a set of specialized high schools in the central city, attended voluntarily by both blacks and whites, which offer technical programs, or programs in the arts, that cannot be duplicated in any suburban schools. It would be romantic to believe this could occur soon; but it would be unfair to future generations of children not to provide a structure within which such educational excellence can grow.

2. VOUCHERS FOR EDUCATION

Perhaps the simplest, cleanest, and most straightforward way to provide equal educational opportunity, independent of race, residence, or wealth, is to give every child a voucher or entitlement, to be used in any accredited school, public or private. Such a plan, which has recently been proposed in Michigan as well as in other states, does not immediately exhibit its potential for encouragement of school integration. But that potential can be quickly realized if the vouchers are worth more in integrated schools. This means that integrated schools would have somewhat higher expenditures, a somewhat richer program, than non-integrated schools. Such a policy, of course, would be objected to by some, but it is hard to see the merit of such objections: for any child, if the parents choose, can attend an integrated school and receive the richer offerings. No one is excluded, by reason of race or any other attribute—except his preference for a segregated school. If he chooses such a school, he pays in the form of a somewhat less rich educational program.

3. A SYSTEM OF INCENTIVES COMBINED WITH CHOICE

A third variation in policy is one that focusses on direct incentives for attendance at an integrated school. The policy, which has been proposed by a Cincinnati school board member, John Rue, is to reward children and parents for the child's attendance at an integrated school. The rewards would be in the form of a postsecondary tuition, so that, for example, attendance at an integrated school for twelve years would result in four years college or other postsecondary tuition—one year for each three years of attendance in an integrated school.

Again, there will be objections to such a policy. But do the objections have merit? Do we want integrated schools or not? And who is expected to be the primary beneficiaries of integrated education? Possibly the children, but just as possibly the larger society, through the increased cohesion and social integration of the society as a whole. If it is the latter, the larger society, that is the primary beneficiary, then the larger society should bear the cost of integration—a cost which is measured by the amount of benefit necessary to provide to families, white and black, in order to achieve the degree of integration desired.

There are, of course, other policies that exhibit the properties I described earlier, but these are a sample. They show that integrated education does not depend on our maintaining romantic notions that are not true. Once we shed these beliefs, the mistaken beliefs on which desegregation policy has rested in the past, and once we shed the other beliefs, the mistaken beliefs that have stifled new ideas that could aid integration, it becomes possible to take the long road toward achieving an integrated society.

FROM CONGRESSIONAL RECORD

September 27, 1978

APPENDIX II

COSTS OF BUSING, COMPARISION OF 1969-70/1977-78 FIGURES WITH 1979-80/1980-81 FIGURES

	1969-70	1977-78	1979-80	1980-81[1]
Charlotte- Mecklenburg County:				
Buses	267	[2]591	[3]616	[4]632
Bus miles	1,908,842	5,954,587	6,355,638	6,660,762
Service behicle miles	------------	572,377	643,953	643,374
Gallons/gas	278,343	1,119,956.5	1,248,108	1,312,071
Cost/gas	$47,448	$456,718.28	$1,044,889	$1,438,456
Raleigh-Wake County:				
Buses	254	525	542	587
Miles	1,676,925	4,532,095	5,283,487	6,027,951
Gallons/gas	332,855	999,123	1,112,896.9	1,219,206.6
Cost/gas	$43,079	$405,928	$933,698.04	$1,264,849.66

APPENDIX II (continued)

	1969-70	1977-79	1979-80	1980-81[1]
Greensboro-High Point-Guilford County:				
Buses------------------	107	567	610	(5)
Miles------------------	[6]593,176	4,100,110.1	4,499,482	(5)
Gallons/gas------------	131,817	847,293.6	888,911	(5)
Cost/gas---------------	$[6]20,596	$341,969.44	$711,002	(5)
Winston-Salem-Forsyth County:				
Buses------------------	208	408	408	408
Miles------------------	1,239,300	4,480,991	4,649,808	4,651,800
Gallons/gas------------	305,307	865,757.9	895,473	895,630
Costs/gas--------------	$37,089	$350,530.99	$686,827.16	$913,371.23

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[1] Figures for 1980-81 approximate.

[2] Plus 50 service vehicles

[3] Plus 59 service vehicles

[4] Plus 46 service vehicles

[5] Figures for 1980-81 not availablu until mid-August

[6] Estimate based on averages from other school districts

APPENDIX III

A BLACK "CONSERVATIVE" DISSENTS

(By Thomas Sowell)

Being a black "conservative" is perhaps not considered as bizarre as being a transvestite, but it is certainly considered more strange than being a vegetarian or a bird watcher. Recently a network television program contacted me because they had an episode coming up that included a black conservative as one of the characters, and they wanted me to come down to the studio so that their writers and actors could observe such an exotic being in the flesh.

Am I a black conservative? It is hard enough to know what a "liberal" or a "conservative" is, without the additional racial modifications. Supposedly a "conservative" is satisfied with the status quo, but in more than 40 years of listening to people, ranging from welfare recipients to the President of the United States, I have never come across this mythical being who is satisfied with the status quo. I know of no statistical research, or even casual observations, that would lead to the conclusion that so-called "conservatives" are more content, complacent or less outraged than people who carry the label "liberal." Some of the angriest people I know are called "moderates." Since truth-in-labeling laws do not apply to politics, there is little that can be done about all this.

Once it is realized that "liberal" and "conservative" are simply arbitrary designations for opposing political teams (more elegant but no more meaningful than "Dodgers" and "Mets"), we can turn to the substance of the issues between them. From this point of view, a so-called "conservative" is nothing more than a dissenter from the prevailing liberal orthodoxy. A "radical" would simply be someone who carries the liberal orthodoxy to further extremes.

Why would a black man dissent from the prevailing liberal orthodoxy, and especially on such racial issues as busing, "affirmative action" and the like? The question itself shows how pervasively the mass media have stereotyped and filtered the news. Most black people oppose busing. Polls that showed a black majority in favor of busing a few years ago have begun to show black pluralities and, finally, an absolute majority of blacks against busing. What is rare is to see any black opponent of busing in the media. The media-created black "spokesman" usually shares media-created values. The impression is insinuated that such "spokesmen" represent the "grass roots," or "authentic" ghetto blacks, while black dissenters from the liberal orthodoxy are from a remote "middle class" fringe. This impression must be insinuated, because there is little evidence for it—and a tremendous amount of evidence to the contrary. Many of the most fiery "militants" are middle-class Negroes now trying to live down their past by being blacker-than-thou, like true converts.

When the Supreme Court struck down state-imposed segregation in 1954, the decision was justifiably hailed as the climax of a struggle of many decades against Jim Crow laws and gross discrimination in the availability of public services, including education as a crucial necessity. Two more decades of bad faith, foot dragging and evasions produced ever tighter judicial control, culminating in court-ordered busing to achieve racial "balance." In short, we have arrived at a position that was not implicit in the original decision, and in many ways goes counter to the original concern for insuring individual constitutional rights without regard to color or other group characteristics.

The prevailing liberal orthodoxy insists that busing is essential for black children to receive their constitutional rights—and that they are to have their rights if it kills them. King Solomon is said to have chosen the true mother of a disputed infant by asking the two women concerned whether each would agree to having the baby cut in half to satisfy their rival claims. It was perhaps the first confrontation between principles of humanity and statistical "balance." Fortunately, King Solomon did not rely on H.E.W. guidelines for a solution.

Remarkably little attention has been paid to the black children who are supposed to benefit from busing. Certainly, little attention has been paid to the facts about their educational or psychological well-being before or after court-ordered "integration." It was assumed from the outset in 1954 that separate schools are inherently inferior. Anyone familiar with the history of numerous all-Jewish or all-Oriental schools could have exposed this for the sheer nonsense it was, and there are also a number of all-black schools that would have exposed this fallacy. All-black Dunbar High School in Washington had an average I.Q. of 111 in 1939, compared with the national average of 100—and this 15 years before sociological stereotypes were enshrined as the "law of the land."

The really crucial assumption behind involuntary busing is that some tangible benefit will result—presumably to black children, but, one would hope, to white children as well, and to the cause of racial understanding and mutual respect. The hard evidence does not support any of these assumptions. One can select isolated pieces of data to support the assumptions, but at least as much evidence can be found showing declining academic performances, lower self-esteem by black children and greater racial antagonism on the part of both black and white children after busing is imposed.

Busing is not a policy but a crusade. For a policy, one can ask, "Does it work?" "At what cost?" "What is the human impact?" For a crusade, the relevant questions are: "Whose side are you on?" "Is your courage failing?" "Can we dishonor the sacrifices of those who went before by turning back now?". The last thing a crusader wants to hear is cost-benefit analysis. And if the crusader is a white liberal whose only children are in private schools, his courage knows no bounds.

One of the last refugees of those who admit the sorry academic and social record of involuntary busing is the so-called "hostage" theory of integration. According to this view, the only chance black children have for getting a fair share of educational resources is to be mixed in with white children, so that discrimination is thwarted. This assumes that it is easier for courts to control racial "balance"—in the face of "white flight"—than to control dollars and cents paid from a central fund. It also assumes a greater educational effect from differences in per-pupil expenditures than existing studies substantiate.

Finally, there is the simple vested interest of civil-rights lawyers and leaders who have a heavy personal stake in pursuing the courses of action that brought them success and prominence in the past. There is nothing peculiar in this. It is, in fact, all too human. Generals have long been known for fighting the last war. In view of history, it may be too much to expect any organization to stop on a dime and then head off in another direction in high gear. But it is not too much to expect the rest of us to be able to see when a given approach has made its contribution, served its purpose and become counterproductive. We certainly need not repeat the mistake of Vietnam by sacrificing the younger generation to spare leaders the embarrassment of losing face.

The question may once have been "segregation" versus "integration" but it is that no longer. Neither Federal, state nor local government may segregate any longer. "Racial balance," however, is in most cases a will-o'-the-wisp, as changing neighborhoods, private schools and exodus to the suburbs repeatedly defeat the numerical goals of busing. In some cases, there is more racial separation in the classroom after years of busing than before. As for "integration" in some more meaningful social and psychological sense, going beyond racial body count, compulsory transportation is the least likely process for achieving that goal. It is a tragic commentary on the liberals' misunderstanding of their fellow human beings that they cannot grasp the difference between the effects of voluntary interracial association and involuntary placement in the same buildings. It is true that, prior to the 1954 Supreme Court decision, much evidence showed greater tolerance and better educational results for black children when going to schools—usually neighborhood schools—with white youngsters. But these were black and white schoolchildren who chose to live and go to school in the same neighborhood, and who grew up around one another—not strangers confronting strangers in an atmosphere of compulsion, anxiety and heightened racial defensiveness.

The grand delusion of contemporary liberals is that they have both the right and the ability to move their fellow creatures around like blocks of wood—and that the end results will be no different than if people had voluntarily chosen the same actions. It is essentially a denial of other people's humanity. It is a healthy sign that those assigned these subhuman roles have bitterly resented it, though it may ultimately prove a social and political catastrophe if their anger at judicial and bureaucratic heavy-handedness finds a target in blacks as scapegoats.

The same statistical approach to human problems found in the busing controversy is applied to the labor market in the Federal "affirmative action" program. There is also the same heavy reliance on assumptions, the same disregard of facts and the same crusading assurance that whatever one does in a noble cause is right.

One of the first things that is done in many noble causes is lying. "Affirmative action" is no exception. The racial, ethnic and sex quotas that are set under "affirmative action" hiring are denied by calling them "goals" and attempting to make elaborate scholastic distinctions between the two. We are told that "goals" are not "really" quotas because goals are flexible while quotas are rigid. But this revision of the English language ignores both facts and usage. "Quota" is no new or exotic word the liberal missionaries must explain to the heathen. There are immigration quotas, import quotas, production quotas and all kinds of other quotas—and whether those quotas happen to be met or not during a particular time period, no one denies that they are quotas. Quotas are quantitative rather than qualitative criteria. Everybody knows that, and that is precisely what critics object to.

"Affirmative action" quotas are supposed to compensate minorities and women for past injustices, but before any benefit can compensate anybody for anything, it must first be a benefit! There is very little hard evidence that "affirmative action" has that net effect, just as there is very little hard evidence that busing benefits black schoolchildren. Black income as a percentage of white income reached its peak in 1970—the year before mandatory quotas ("goals and timetables") were established—and has been below that level ever since (due largely to the recession). In short, blacks achieved the economic advances of the 1960's once the worst forms of discrimination were outlawed, and the only additional effect of quotas was to undermine the legitimacy of black achievements by making them look like gifts from the Government.

Undoubtedly, here and there some individuals have gotten jobs they would never have been eligible for otherwise. But however striking such examples might be, the over-all picture depends on two other factors—what proportion of the labor force such people constitute, and the extent to which "affirmative action" has the offsetting consequence of actually reducing job opportunities for minority or female applicants. Since quotas apply not only to hiring but also to pay and promotion, some employers choose to avoid later problems by minimizing the initial hiring of nonwhite or female applicants. This is particularly true where there is a substantial risk that any applicant—of whatever race or sex—may have to be let go later on. For example, in the academic world, the "up-or-out" promotion system means that the top universities are constantly firing many junior faculty members at the end of their contracts, without any explicit "fault" being alleged. The legal and political dangers in applying this policy to minorities and women give universities an incentive either to avoid hiring minorities and women or to sidetrack them into special administrative jobs where this policy does not apply. Other industries also create "special" or "token" jobs for similar reasons, with the same net effect of reducing the career prospects of minorities and women—as a result of Government pressures designed to have the opposite effect.

Despite a tendency to consider women as a "minority," both the history and the present situation of women are quite different. Contrary to a fictitious history about having come a long way, baby, women today have less representation in many high-level positions than 30 or 40 years ago. In earlier times, women made up a higher proportion of doctors, academics, people in Who's Who, and in professional, technical and managerial positions generally. If you plot on a graph the proportion of women in high-level jobs over the past several decades, and on a parallel graph the number of babies per woman, you will see almost an exact mirror image. That is, as women got married earlier and earlier and had more and more babies, their careers declined. In recent times, as the "baby boom" passed and both marriage rates and childbearing declined, women have started moving back up the occupational ladder relative to men—though in many cases not yet achieving the relative position they held in the 1930's. This upturn was apparent before "affirmative action" quotas.

If you go beyond the sweeping comparisons of "men and women" that are so popular, it is clear that marriage and childbearing have more to do with women's career prospects than employer discrimination. In 1970—before mandatory "goals and timetables"—single women in their 30's who had worked continuously since high school averaged higher earnings than single men in their 30's who had worked continuously since high school. In the academic world, single women with Ph.D.'s achieved the rank of full professor more often than single men who received their Ph.D.'s at the same time—and this again, before quotas.

These are among the many facts ignored by proponents of "affirmative action." Such facts are relevant to policy but they do not support a crusade, which requires an identifiable enemy, such as male chauvinist employers. A much stronger case can be made that career women are discriminated against in the home, where they are expected to carry most of the domestic burdens, regardless of their jobs. But there is no crusade to mount, and no political mileage to be made, from advising women to go home and tell their husbands to shape up. Both messiahs and politicians have to be able to promise people something, and very often that involves misstating the original problem, in order to make the promise sound plausible.

The grand assumption that body count proves discrimination proceeds as if people would be evenly distributed in the absence of deliberate barriers. There isn't a speck of evidence for this assumption, and there is a mountain of evidence against it. Even in activities wholly within each individual's control, people are not evenly distributed: The choices made as to what television programs to watch, what games to play, what songs to listen to, what candidates to vote for, all show the enormous impact of social, cultural, religious and other factors. One-fourth of the professional hockey players in the United States come from one state; more than a quarter of all American Nobel prize winners are Jewish, more than half of all professional basketball stars are black. Can one state discriminate against the other 49? Can Jews stop Gentiles from getting Nobel prizes, or blacks keep whites out of basketball? Obviously there are reasons of climate, tradition and interest that cause some groups' attention to be drawn strongly toward some activities, and that of other groups toward other activities. It need not even involve "ability." Some groups that have been tremendously successful in some activities have been utter failures in other activities requiring no more talent. Even such an economically successful urban group as American Jews had an unbroken string of financial disasters in farming, while immigrants from a peasant background succeeded, even though peasant immigrants coudl not begin to match the Jews' performance in an urban setting. As a noted historian once said, "We do not live in the past, but the past in us."

It takes no imagination at all to see the heavyweight of the past among both minorities and women. Even those minority and female individuals who are able to take advantage of higher educational opportunities do not specialize in the same fields as others, but disproportionately choose such fields as education and the humanities—where most people are poorly paid, regardless of sex or race. There are good historical explanations for such choices, but these are not necessarily good economic reasons. However, unless we are prepared to deny free choice to the supposed beneficiaries of "affirmative action," it is arbitrary social dogma to expect an even distribution of results.

Should we do nothing? That is the bogeyman of unbridled discrimination that "affirmative-action" spokesmen try to scare us with. But we were not doing "nothing" before quotas came in. The decade of the 1950's saw some of the strongest antidiscrimination laws passed anywhere, backed up by changing public opinion and by a new awareness and militancy among minorities and women. The dramatic improvement in the economic position of blacks was just one fruit of these developments. Despite the tendency of "affirmative action" proponents to conjure up images of discrimination in decades past, the question is, what existed just before the quotas, and what has happened since? That is the relevant question, and the answer shows a mountain laboring to bring forth a mouse—and often not succeeding. As we have seen, the ratio of black income to white income has never been as high since mandatory quotas as it was just before such "goals and timetables."

Why is "affirmative action" so ineffective despite all the furor it stirs up? Simply because its shotgun statistical approach hits the just and the unjust alike. Just as the crime does not consist of demonstrable discrimination against someone, but of a failure to meet governmental preconceptions, so the punishment does not usually consist of penalties imposed at the end of some adjudicatory process but of having to go through the process itself. For example, the University of Michigan had to spend $350,000 just to collect statistics for "affirmative action." For all practical purposes, that is the same as being assessed a $350,000 fine without either a charge or proof of anything. Most "affirmative action" proceedings do not end up in proof of guilt or innocence, or in any penalty though many end up settled by "peace with honor" in the form of elaborate plans, with good intentions spelled out in statistical detail: 1.3 more black accountants per year, 2.7 more female chemists, etc. If King Solomon had operated under "affirmative action," he would have promised each woman 0.5 children, and gone back to business as usual.

It has long been known that the road to hell is paved with good intentions, and that is where they lead in this case. And since many of the quotas were virtually impossible of achievement from the outset, there is even less reason than usual to expect much from such statements under such pressures. Just as in television the medium is the message, so under "affirmative action" the process is the penalty. And since this penalty falls on the guilty and the innocent alike, it provides no reason for even the worst bigot to change. Nor will it exempt even the purest heart from the harassments of bureaucrats. Indiscriminate penalties do not produce change but only resentment. As in the case of busing, resentment against Government heavy-handedness is often misplaced as hostility to the supposed beneficiaries. The fact that there is really very little benefit to any group only completes this tragic farce.

One of the reasons why many programs that don't work still keep going strong is that they sound so noble. Moreover, championing the disadvantaged is not only an inspiration but an occupation. To be blunt, the poor are a gold mine. By the time they are studied, advised, experimented with and administered, the poor have helped many a middle-class liberal to achieve affluence with Government money. The total amount of money the Government spends on its many "antipoverty" efforts is three times what would be required to lift every man, woman and child in America above the official poverty line by simply sending money to the poor. Obviously, there are a lot of middlemen who get theirs: administrators, researchers, consultants, staffers, etc. These are the army of people who "take care" of the poor in a variety of ways. Such caretakers are the modern equivalent of the missionaries who came to do good and stayed to do well. It is no accident that the highest income counties in the United States are in the suburbs of Washington, D.C. Poverty is the cause of much of that affluence.

Central to the costly "caretaker" approach to helping the poor—by paying money to someone else—is an image of the poor as too helpless to make it with mere money. A picture is said to be worth a thousand words, but this particular image is worth billions of dollars to the caretaker class. Public resentment at the tax cost of the "antipoverty" establishment takes the form of disenchantment with the poor and minorities, though most of the money ends up in the pockets of people who are neither.

Like every army, the army of caretakers requires both material and moral support. The taxpayes supply the material support. The moral support comes from those who accept the image of the helpless poor and who project that image—and the corresponding "need" for caretakers—through the mass media, in the colleges, and to a captive audience of millions in "social studies" in the public schools. Since many who project such an image are themselves products of years of the same kind of sociopolitical conditioning, something very close to perpetual motion has been created.

The image of the helplessness of the poor is repeatedly invoked to defeat proposals for income maintenance, educational vouchers and any other reforms that would enable the poor to make their own decisions and eliminate the caretakers. How helpless are the poor? And—since I am speaking as a black "conservative"—specifically, how helpless are blacks?

History shows that one of the most massive internal migrations in this country has been the movement of millions of blacks out of the South in the last two generations, in order to seek a better life for themselves. This was a spontaneous decision of millions of individuals, not organized by indigenous "leaders" nor promoted by outside caretakers. Going even further back in history, to 1850, the census of that year showed that most of the half-million "free persons of color" were literate, despite (1) being denied access to public schools in most parts of the country, (2) being forbidden by law to go to any schools in many Southern states, and (3) having very low incomes and occupations and few opportunities to cash in on the education. Private and even clandestine schools for blacks existed all over the United States in 1850, most of them supported by blacks themselves out of meager incomes.

Today, many ghetto blacks in cities across the country are sending their children to Catholic schools—though the blacks in question are usually Protestants—in order to seek better education than the public schools provide. For example, it has been estimated that more than 10 percent of all black children in Chicago go to Catholic schools. If educational vouchers were to make education free at both private and public institutions, would black parents be too helpless to make a choice among the various schools available to them? Or is the real problem that many caretakers in the educational bureaucracies would find themselves out of a job?

At a time when every silly trend in education is proclaimed in the media as an "innovation," the struggle of thousands of poor black families to send their children to private schools is a nonevent for those who shape public opinion. Where these private schools are Catholic, they are often in ghetto neighborhoods abandoned by earlier Catholic immigrant minorities, and it is not uncommon today for the bulk of the student body in these schools to the non-Catholic. Some of the Catholic schools have achieved remarkable educational success with black students, at far lower cost per pupil than the public schools. But it isn't news.

Indeed, black advancement in general isn't news. The research team of Scammon and Wattenberg was roundly denounced in the media when it reported very substantial gains of blacks across a broad front, in education, income, occupation and housing in the decade of the 1960's. In olden times, messengers were sometimes killed for bringing bad news to the king. Today those who bring good news are in jeopardy, for they are threatening the whole caretaker industry and undermining an image supported by the caretakers' allies in the media and in politics.

How unusual is a so-called "black conservative"? Not very. Being an exception to a media image is not being an exception in real life. The real opinions of flesh-and-blood black people have repeatedly been found to be completely different from the "black" opinions of media-selected "spokesmen."

An Ebony magazine poll comparing the views of blacks with those of college students found blacks consistently more "conservative" than the college students. The great majority of blacks considered this country worth defending against foreign enemies and rejected violence as a means of achieving social change. A Gallup poll found that a substantial majority of blacks regard the courts as too lenient on criminals. Still another survery found that more than three-quarters of the blacks describe themselves as "sick and tired" of hearing attacks on "traditional American values."

So being a black "conservative" is not quite as distinctive as it might seem.

FROM CONGRESSIONAL RECORD

December 3, 1980

APPENDIX IV

(Statement of Sam J. Ervin, Jr. of Morganton, N. C., a former United States Senator from North Carolina)

EXCLUSION FROM NEIGHBORHOOD SCHOOLS OF CHILDREN AND THEIR FORCED BUSING FOR INTEGRATION: UNCONSTITUTIONAL FEDERAL TYRANNIES

The exclusion from their neighborhood schools and the forced busing of school children for integration purposes is a foolish, wasteful, and useless tyranny, which is outlawed by the very provision of the Constitution invoked by the Supreme Court to justify it, namely, the equal protection clause of the Fourteenth Amendment.[1]

My Abiding Convictions Respecting the Constitution

Before explaining why this is so, I deem it not amiss to make certain observations. I have lived about four score and five years; I have spent a substantial part of my energy and time during these years in studying the Constitution, its history, and its objectives; I have acquired by my study abiding convictions respecting these matters; and I note that many Americans far wiser than I have entertained like convictions.

The Constitution is our most precious heritage as Americans. When it is interpreted and applied aright, the Constitution protects all human beings within our borders from anarchy on the one hand and tyranny on the other.

The wise British statesman, William Ewart Gladstone, rightly described the American Constitution as the most wonderful work ever struck off at a given time by the brain and purpose of man.[2]

Why the Constitution Was Written and Adopted

For ease of expression, I use the term Founding Fathers to designate those who framed and ratified the Constitution submitted by the Convention of 1787, and those who framed and ratified the amendments which have been added to it.

The Founding Fathers knew the history of the frustrating struggle of the people against arbitrary governmental power during countless generations for the right to self rule and to be free from tyranny, and understood the tragic lessons taught by that history.

As a consequence they comprehended these eternal truths: First, that "whatever government is not a government of laws is a despotism, let it be called what it may";[3] second, that the "occupants of public office love power and are prone to abuse it";[4] and, third, that what autocratic rulers of the people had done in the past was likely to be attempted by their new rulers in

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Footnotes at end of article

the future unless they were restrained by laws which they alone could neither alter nor nullify.[5]

The Founding Fathers desired above all things to secure to the people in a written Constitution every right they had wrested from autocratic rulers while they were struggling for the right to self rule and freedom from tyranny.

Their knowledge of history gave them the wisdom to know that this objective could be accomplished only in a government of laws, i.e., a government which rules by certain, constant, and uniform laws rather than by the arbitrary, uncertain, and inconstant wills of impatient men who happen to occupy for a fleeting moment of time legislative, executive, or judicial offices.

For these reasons, the Founding Fathers framed and ratified the Constitution, which they intended to last for the ages, to constitute a law for both rulers and people in peace and in war, and to cover with the shield of its protection all classes of men with impartiality at all times and under all circumstances.[6]

While they intended it to endure for the ages as the nation's basic instrument of government, the Founding Fathers realized that useful alterations would be suggested by experience.[7]

Consequently, they made provision for its amendment in one way and one way only, i.e., by combined action of Congress and the states as set forth in Article V. By so doing, they ordained that "nothing new can be put into the Constitution except through the amendatory process" and "nothing old can be taken out without the same process";[8] and thereby forbade Supreme Court Justices to attempt to revise the Constitution while professing to interpret it.[9]

The Constitutional Separation of Powers

In framing and ratifying the Constitution, the Founding Fathers recognized and applied an everlasting truth embodied by the British philosopher, Thomas Hobbes in this phrase: "Freedom is political power divided into small fragments."

They divided governmental powers between the federal government and the states by delegating to the former the governmental powers necessary to enable it to operate as a national government for all the states, and by reserving to the states all other governmental powers.[10]

They divided among the Congress, the President, and the Federal judiciary the powers given to the federal government by giving to Congress the power to make federal laws, imposing on the President the duty to enforce federal laws, and assigning to the federal judiciary the power to interpret federal laws for all purposes and state laws for the limited purpose of determining their constitutional validity.[11]

In making this division of powers, the Founding Fathers vested in the Supreme Court as the head of the federal judiciary the awesome authority to determine with finality whether governmental action, federal or state, harmonizes with the Constitution as the supreme law of the land, and mandated that all federal and state officers, including Supreme Court Justices, should be bound by oath or affirmation to support the Constitution.[12]

The Duty of Supreme Court Justices

No question is more crucial to America than this: What obligation does the Constitution impose on Supreme Court Justices?

America's greatest jurist of all time, Chief Justice John Marshall answered this question with candor, clarity, and finality by his opinion in Marbury v. Madison and Gibbons v. Ogden. In these indisuptably sound decisions, Chief Justice Marshall declared:

1. That the principles of the Constitution are fundamental, and are designed to be permanent.

2. That the words of the Constitution must be understood to mean what they say.

3. That the Constitution constitutes an absolute rule for the government of Supreme Court Justices in their official action.

4. That the oath or affirmation of a Supreme Court Justice to support the Constitution "is worse than solemn mockery" if he does not "discharge his duties agreeably to the Constitution of the United States."[13]

In elaborating his second declaration, Chief Justice Marshall said:

> "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have used words in the natural sense, and have intended what they have said."[14]

This being true, Supreme Court Justices are forbidden to commit verbicide on the words of the Constitution while they are pretending to interpret them. I am indebted to Dr. Oliver Wendell Holmes for the expressive term verbicide. He declared in his Autocrat of the Breakfast Table:

> "Life and language are alike sacred. Homicide and verbicide -- that is, violent treatment of a word with fatal results to its legitimate meaning, which is its life -- are alike forbidden."[15]

The Founding Fathers undertook to immunize Supreme Court Justices against temptation to violate their oaths or affirmations to support the Constitution by making them independent of everything except the Constitution itself. To this end, they stipulated in Article III that Supreme Court Justices "shall hold their offices during good behaviour * * * and receive for their services a compensation, which shall not be diminished during their continuance in office."

In commenting upon the awesome power vested by the Constitution in Supreme Court Justices, Justice (afterwards Chief Justice) Stone made this cogent comment: "While unconstitutional exercise of power by the executive and legislative branches of government is subject to judicial restraint, the only check on our own exercise of power is our own sense of self-restraint."[16]

Many years after the adoption of the Constitution, Daniel Webster, one of the wisest of statesmen, made a caustic and correct comment upon public officials who undertake to substitute their personal notions for rules of law. He said:

> "Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters."[17]

By this comment, Webster portrayed the judicial activist with accuracy. A judicial activist is a judge who interprets the Constitution to mean what it would have said if he instead of the Founding Fathers had written it.

The Constitution does not suffice, however, to check the unconstitutional exercise of power by Supreme Court Justices who are judicial activists because they are either unable or unwilling to subject themselves to the requisite self-restraint. As a consequence, they substitute their personal notions for constitutional precepts while pretending to interpret that instrument.

Judicial Activism Is Destructive of Constitutional Government

Many distinguished Americans, who understood and revered the Constitution, have rightly declared that judicial activism is destructive of the Constitution because it tends to substitute government by the personal notions of judges for the government of laws that instrument was ordained to establish. I quote three of the most famous of them.

George Washington, who served as President of the Convention which framed the Constitution before becoming the first President of our country under it, made this assertion in his Farewell Address:

> "If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always over-balance in permanent evil any partial or transient benefit which the use can at any time yield."

Judge Thomas M. Cooley, author of Constitutional Limitations, declared:

> "1. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.
>
> "2. A court * * * which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. * * * What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may required."[18]

Benjamin N. Cardozo, Chief Judge of the New York Court of Appeals and Justice of the United States Supreme Court, stated in his enlightening treatise The Nature of the Judicial Process that "judges are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom" and that "it would put an end to the reign of law" if judges adopted the practice of substituting their personal notions of justice for rules established by a government of laws.[19]

No Judicial Decision Merits Respect If It Is Repugnant to the Constitution

Some of those who condone judicial activism and verbicide assert that all decisions of the Supreme Court ought to be deemed sacrosanct, and that patriotism commands all citizens to refrain from criticizing them because criticism diminishes the respect of the people for the Court.

This assertion is intellectual rubbish. No judicial decision merits respect unless it is respectable, and no judicial decision is respectable if it flouts the Constitution which the judges participating in it are bound by oath or affirmation to support.

As Justice Frankfurter has so well declared, "judges as persons or courts as institutions are entitled to no greater immunity from criticism than other persons or institutions * * Judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."[20]

Chief Justice Stone concurred with Justice Frankfurter's views by stating that "where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action, and fearless comment upon it."[21]

The most vigorous denunciation of judicial activism and verbicide by Supreme Court Justices is to be found in opinions of their Brethren. For example, Justice Jackson had this to say in his concurring opinion in Brown v. Allen, 344 U.S. 443, 535:

> "Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles."

Justice Jackson added this scathing observation to his concurring opinion: "But I know of no way that we can have equal justice under law except we have some law." (344 U.S. at page 546)

Since Justice Jackson wrote his concurring opinion in 1952, the Supreme Court has vastly stepped up its judicial activism and verbicide. By so doing, it has made plain a truth which James Madison expressed as a belief to the Virginia Convention on June 16, 1788. At that time Madison said:

> "Since the general civilization of mankind, I believe that there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

By constantly increasing judicial activism and verbicide, Supreme Court Justices have expanded for practical purposes the powers of the federal government in general and their own powers in particular far beyond the bounds to such powers set by the Constitution, and have converted the Supreme Court itself in large measure from a judicial tribunal in a government of laws into a judicial oligarchy whose decisions are controlled by the personal notions of its members.

As a consequence, the states have been largely reduced to meaningless zeros on the nation's map and virtually all the public activities of the people and many of their private activities, private preferences, and private thoughts have been directly or indirectly subjected to federal regulation.

Time and space preclude a statement of the impact of all their judicial activism and verbicide on constitutional government in America and the freedom of Americans. I shall, therefore, confine what I have to say on the subject to the decrees of the Supreme Court which sanction the exclusion from neighborhood schools and forced busing of school children for integration purposes. The Supreme Court asserts that these decrees are justified by the equal protection clause of the Fourteenth Amendment. The words and objective of this clause contradict this claim.

By practicing judicial activism and verbicide on this constitutional provision, the Supreme Court distorts it into conferring upon itself, inferior federal courts, and unelected federal bureaucrats the arbitrary power to deny school children of all races the right to attend schools in their neighborhoods and to order them to be bused to distant schools elsewhere to mix them in racial proportions pleasing to judges and bureaucrats, and thus makes innocent school children of all races the helpless and hapless pawns of judicial and bureaucratic tyranny.

The stark nature of this tyranny was revealed to a limited degree by news items of recent days emanating in Louisiana. According to these news items, a federal judge sitting in that state threatened to adjudge three white teen-aged high school girls guilty of contempt of his court and to punish them accordingly.

Their offense was that they had continued to seek their education at their familiar neighborhood school instead of jurneying by bus to an unfamiliar distant school elsewhere. In so doing they had allegedly disobeyed an order issued by the federal district judge commanding the state school board to deny them admittance to their neighborhood school and to bus them to the distant school elsewhere for integration purposes.

In a very real sense, all judges of inferior federal courts are servants of the federal judicial hierarchy headed by the Supreme Court. The federal district judge sitting in Louisiana undoubtedly acted under the conviction that his action was required by the forced busing decrees of Supreme Court Justices.

The True Meaning and Objective of the Equal Protection Clause

The Fourteenth Amendment became a part of the Constitution on July 21, 1868. When it is interpreted and applied aright, its equal protection clause is one of the simplest and most salutary of the provisions of the Constitution.

The clause extends its protection to all persons of all races, colors, or classes who are similarly situated within the boundaries of any state. Its objective is to secure equality to such persons under the laws of the state.[22] The clause specifies that no state "shall deny to any person within its jurisdiction the equal protection of the laws."[23]

By this phrase, the equal protection clause requires the laws of the state to treat all persons within its jurisdiction alike under like circumstances, both in the rights conferred and the responsibilities imposed.[24]

The clause applies only to states and to state officials acting under state law. Further than that, the clause does not go. It does not apply in any way to private individuals, or confer upon the federal government any power to control their conduct.[25]

Since all federal officers, including Supreme Court Justices, are bound by oath or affirmation to support the Constitution, no court, department, or agency of the federal government has any power to require a state or any state officer acting in its behalf to violate the equal protection clause. The Supreme Court has expressly ruled that Congress cannot do so.[26]

The Brown Case

During the 86 years following the ratification of the Fourteenth Amendment, presidents, governors of states, Congress, state legislatures, and federal and state courts interpreted the equal protection clause to permit a state to segregate by law persons within its jurisdiction on the basis of race as long as the facilities which served them were equal.

The interpretation was known as "the separate but equal doctrine." This doctrine did not originate in any Southern state. It had its genesis in Massachusetts. In 1849, the Supreme Judicial Court of Massachusetts created and applied it in Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, when it rejected the plea of Senator Charles Sumner that the City of Boston be compelled to admit black children to a racially segregated school for whites.

By a 7 to 1 vote, the Supreme Court applied "the separate but equal doctrine" to the segregation of passengers on the basis of race in transportation in 1896 in Plessy v. Ferguson, 163 U. S. 537; and by an unanimous vote, the Supreme Court applied "the separate but equal doctrine" to the segregation of children in public schools on the basis of race in 1927 in Gong Lum v. Rice, 275 U.S. 78.

Justice Brown of Michigan wrote the opinion in Plessy v. Ferguson for a court composed of himself and Chief Justice Fuller of Illinois, and Justices Field of California, Harland of Kentucky, Gray of Massachusetts, Brewer of Kansas, Shiras of Pennsylvania, White of Louisiana, and Peckham of New York. Harlan dissented, and Brewer did not participate. Harlan based his dissent on the proposition that "our Constitution is color blind."

Chief Justice Taft wrote the opinion in Gong Lum v. Rice for an unanimous Supreme Court composed of himself and Justices Holmes and Brandeis of Massachusetts, Van Devanter of Wyoming, McReynolds and Sanford of Tennessee, Sutherland of Utah, Butler of Minnesota, and Stone of New York.

On May 17, 1954, the Supreme Court handed down its unanimous decision in Brown v. Board of Education of Topeka, 347 U. S. 483. By this ruling the Supreme Court adjudged "that in the field of public education the doctrine of separate but equal has no place." In its final analysis, the decision in the Brown Case is based upon the proposition that the equal protection clause of the Fourteenth Amendment forbids a state to consider race in assigning children to its public schools, and in consequence a state violates the clause if it excludes a child from any of its schools because of the child's race. Hence, the decision accepts as valid Justice Harlan's assertion in Plessy v. Ferguson that "our Constitution is color blind."

At the time the decision in the Brown Case was announced 17 states and the District of Columbia were maintaining segregated schools for black and white children.

It is no exaggeration to say that the decision of the Supreme Court in the Brown Case shocked the nation. In common with multitudes of other Americans, I doubted its validity and wisdom. Such a drastic change in the interpretation of the equal protection clause, I thought, ought to have been made by a constitutional amendment and not by judicial fiat.

Since the Supreme Court handed down its decision in the Brown Case, I have spent much energy and much time studying the origin, the history, the language, and the objective of the equal protection clause of the Fourteenth Amendment.

My study has constrained me to accept as valid these deliberate and definite conclusions:

-- The "separate but equal doctrine" is consistent with the origin and history of the equal protection clause.

-- Nevertheless, the "separate but equal doctrine" is inconsistent with the words and manifest purpose of the equal protection clause.

-- The equal protection clause requires the laws of a state to treat alike all persons in like circumstances within its borders both in respect to rights conferred and responsibilities imposed.

-- The objective of the equal protection clause is to insure equality under state law of all persons similarly situated within the borders of the state.

-- A state frustrates the equal protection clause and its objectives if it makes the legal right or legal responsibility of persons within its borders depend upon their race.

-- The Brown Case requires a state to assign its children to its public schools without regard to their race and invalidates any state law to the contrary.

-- Despite my original misgivings respecting it, the Brown Case constitutes a proper interpretation of the equal protection clause.

-- The equal protection clause governs state action only, and does not apply in any way to the conduct, dealings, associations, social activities, or racial preferences of individuals.

-- Finally, the equal protection clause contemplates that all persons shall enjoy equal civil liberties under state law, but does not entitle any persons of any race to any special privileges or preferences superior to those accorded to persons of other races by state law.

Judge Parker's Explanation of the Brown Case and The Equal Protection Clause

When the Supreme Court made its decision in the Brown Case, it decided four separate cases which it had combined for the purpose of hearing and decision. After its decision, the Supreme Court remanded the four separate cases to the courts in which they had originated for further appropriate proceedings.

One of the four cases, Briggs v. Elliott, involved a challenge to the constitutionality under the equal protection clause of the public schools of Clarendon County, South Carolina. This case had originated in the United States District Court for the Eastern District of South Carolina and had been decided in the first instance by a three-judge district court compored of Circuit Judge Parker, and District Judges Waring and Timmerman.[27]

Circuit Judge John J. Parker, who afterwards served as Chief Judge of the United States Court of Appeals for the Fourth Circuit, was deemed by the bench and bar to be one of America's greatest jurists of all times.

After the Briggs Case was remanded to the United States District Court for the Eastern District of South Carolina by the Supreme Court for further proceedings, Judge Parker wrote what he called a per curiam opinion for the three judge court, which was then composed of himself, Circuit Judge Dobie, and District Judge Timmerman.

In this illuminating opinion, Judge Parker explained the Brown Case and the equal protection clause with correctness and clarity. In so doing, he said:

> "This Court in its prior decisions in this case, 98 F.Supp. 529; 103 F.Supp. 920, followed what it conceived to be the law as laid down in prior decisions of the Supreme Court, Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256; Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed.172, that nothing in the Fourteenth Amendment to the Constitution of the United States forbids segregation of the races in the public schools provided equal facilities are accorded the children of all races. Our decision has been reversed by the Supreme Court, Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 757, which has remanded the case to us with direction 'to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases.'
>
> "Whatever may have been the views of this court as to the law when the case was originally before us, it is our duty now to accept the law as declared by the Supreme Court.
>
> "(1-4) Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limiation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.
>
> "The Supreme Court has pointed out that the solution of the problem in accord with its decisions is the primary responsibility of school authorities and that the function of the courts is to determine whether action of the school authorities constitutes 'good faith implementation of the governing constitutional principles'. " 28

Judge Parker's sound explanation of the Brown Case and the equal protection clause was subsequently rejected by the judicial activists on the Supreme Court.

De Jure and De Facto Segregation

The Brown Case rightly held that the federal government has no power whatever in respect to the assignment of students to the public schools of a state unless the state discriminates against a child by denying him admission to one of its schools solely because of his race.

Subsequent decisions correctly accept this principle as valid. Under it, segregation of the races in public schools is either de jure or de facto.

De jure segregation, which is subject to federal authority, is an existing condition of segregation in a public school resulting from intentionally segregative action on the part of the school board acting as a state agency, and de facto segregation, which lies outside the bounds of federal authority, is an existing condition of segregation arising out of the custom of American families of different races to establish their homes in communities inhabited by other families of their respective races.[29]

The Compulsory Integrationists And The Die-Hard Segregationists

It is necessary to describe the political climate which prevailed in the United States during the years of the civil rights revolution. As I stated on occasions during that time, the constant preoccupation and agitation respecting race impaired our national sanity.

The spirit of moderation, tolerance, and mutual understanding ordinarily characteristic of Americans of all races and all walks of life was largely lacking. People of diverse views respecting racial matters engaged in furious, intolerant, and uncompromising controversies concerning them. These controversies erupted in political and legal battles, and sometimes in physical encounters.

For ease of expression, I call the extremists among one group compulsory integrationists, and those among the other die-hard segregationists. I was not happy with either the compulsory integrationists or the die-hard segregationists, and they were not happy with me. Some of the compulsory integrationists applied to me their most approbrious epithet "racist", and some of the die-hard segregationists called me a "flaming liberal."

Despite their violent disagreements in general, both the compulsory integrationists and the die-hard segregationists spurned my abiding conviction that the Constitution commands that men of all races shall enjoy equality under the law and forbids the grant of special legal rights and special legal privileges to men of one race denied to men of other races.

The thinking of the compulsory integrationists on this score was twisted awry. They had convinced themselves that members of the minority race were entitled to legal rights superior to those of members of the majority race, and their goal was to induce, if not to coerce, Congress and the federal judiciary and agencies to grant members of minority races such superior legal rights.

The die-hard segregationists were equally wrong. They were convinced that the legal status of members of the minority race ought to be inferior to that of members of the majority race, and they acted accordingly.

The compulsory integrationists claimed that they were merely seeking to eradicate from the hearts of all Americans the attitudes and inclinations they deemed to be racial prejudicides or racial preferences. They were bent on accomplishing their objectives by the coercive power of law rather than by the persuasive power of reason or religion. The laws they sought, and in some instances secured, convert innocent external acts into illegal conduct upon the conclusion or supposition of fallible federal officers that the innocent external acts were done with racial discrimination or racial preference.

I strongly disagreed with the compulsory integrationists in this respect. I believed that the true function of law is to outlaw external acts which are evil, and not to regulate the thoughts of men, no matter how erroneous their thoughts may be.

Laws which make innocent external acts illegal solely on the basis of the internal thoughts which may accompany them are dangerous. They are, indeed, the stuff of which tyranny is made.

This is true because the administrators of such laws do not possess the clairvoyant power to determine what is in the human heart. As the Old Testament so well says in I Samuel, Chapter 16, verse 7, "The Lord seeth not as man seeth; for man looketh upon the outward appearance; but the Lord looketh on the heart."

I deemed the demands of the compulsory integrationists unwise for other reasons.

While I abhorred racial prejudice in all its aspects, I entertained the earnest belief that racial prejudice can be effectively removed from the human heart only by reason or religion. Furthermore, I rejected the notion that racial preference is synonymous with racial prejudice. In my judgment, racial preference is inseparable from liberty in some of the most intimate relationships and some of the most significant activities of men of all races.

I also entertained the earnest belief that the means by which the compulsory integrationists sought to impose their objectives on the people of our nation were incompatible with the purpose of the Founding Fathers in drafting and ratifying a written Constitution which divides governmental powers between the federal government and the states.

This purpose was explained with complete fidelity to truth by Chief Justice Salmon P. Chase in Texas v. White, 1 Wallace (U.S.) 725, when he said: "The Constitution, in all its provisions, looks to an indissoluble union composed of indestructible states."

The ultimate goal of the compulsory segregationists, I believe, was to reduce the states to meaningless and impotent zeroes insofar as the regulation of inter-racial relationships was concerned. Their immediate goal was undoubtedly to persuade federal courts and agencies by specious interpretations of the equal protection clause to compel the states to integrate all their schools racially and thus deny children of all races any liberty to choose the schools they attended.

I deplored the attitude and response of some die-hard segregationists toward peaceful demonstrations by members of the minority races who were seeking to obtain equality of rights under the law.

The First Amendment, which I revere, gives to both the wise and the foolish a constitutional right to engage in peaceable demonstrations to present their grievances, real or imaginary, to government or the public. Peaceable demonstrations have therapeutic value in all cases.

If the grievances are real, the peaceable demonstrations may persuade government to grant appropriate relief; and if they are imaginary they may relieve the demonstrators of their tensions, in whole or in part.

I abhorred the brutality which die-hard segregationists sometimes visited upon peaceful demonstrators during the civil rights revolution. I was outraged by the attack some die-hard segregationists made upon the demonstrators who were marching from Selma to Montgomery, and publicly stated that they were the most effective allies the compulsory integrationists had.

Both the compulsory integrationists and the die-hard segregationists disliked the Brown Case. The former did so because it adjudged that the equal protection clause forbade racial discrimination, but did not mandate racial integration; and the latter because it prohibited segregation in the future similar to that of the past.

The Civil Rights Act of 1964

Section 5 of the Fourteenth Amendment provides that "the Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Ten years after the Brown Case, Congress exercised its power to enforce the equal protection clause insofar as it relates to the assignment of students to state educational institutions. It enacted Title IV of the Civil Rights Act of 1964.[30] Its purpose in so doing was to clarify the role of the federal government in the assignment of students to state schools and bring peace to an America troubled by the bitter controversies between the compulsory integrationists and the die-hard segregationists.

The Title rightly recognized as sound the ruling of the Brown Case that the equal protection clause forbids a state to practice racial discrimination in assigning students to its educational institutions, but does not empower federal courts or officials to compel states to integrate such institutions in racial proportions pleasing to them. Both the words of the Title and its legislative history are as clear as sunlight in a cloudless day.

Since it was in rapport with the equal protection clause, the Title was well designed to win the approbation of all Americans other than those who are wedded to the obsession that the Constitution should be construed to satisfy their personal notions rather than its own objectives.

By Title IV, Congress regulated what had become known as "desegregation" in public education.

By provisions of Section 401(a) and 407(a), which were incorporated in the Title as it was originally proposed and retained in the Title in its final formulation, Congress specified with exactness and completeness what the equal protection clause requires of the state in assigning children or students to its educational institutions, and the role, i.e., the function, of federal courts and federal officers in respect to this state activity.

Section 401(a) in its original and final form expressly declares that " 'desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin."

Section 407(a) in its original and final form explicitly denies the Attorney General power to bring legal proceedings to desegregate the educational institutions of a state unless children "as members of a class of persons similarly situated are being deprived by a school board of the equal protection of the laws", or an individual "has been denied admission to or not permitted to continue at a public college by reason of race, color, religion, or national origin."

Congress could not have found plainer words to enforce the equal protection clause and establish these principles as law for people and rulers alike:

1. The state's obligation in assigning students to its educational institutions is simply to make the assignment "without regard to their race, color, religion, or national origin."

2. The role, i.e., the function, of federal courts and federal officers is simply to enforce that obligation in case the state fails to perform it.

3. Federal courts and officers have no power in any event to order the state to assign students to its educational institutions on the basis of their "race, color, religion, or national origin."

While Congress was debating and formulating Title IV, many Senators and Representatives expressed concern with the increasing tendency of inferior federal courts and federal officers to order state school boards to assign students to their schools on a racial basis and thus compel them to integrate their schools racially instead of merely preventing racial discrimination.

To allay this concern, Congress added amendments to Title IV as originally proposed to make it doubly certain the Title would prohibit racial integration by the fiat of federal courts and federal officers as well as racial discrimination by the state in the assignment of students to state educational institutions.

One of these amendments was incorporated in Section 401(a) immediately after the Title's original and final definition of what constitutes "desegregation", and consisted of these words: "but 'desegregation' shall not mean the assignment of students to public schools to overcome racial imbalance."

The other amendment was incorporated in Section 407(a), and was expressed in this unmistakable language: "Provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

The proviso did not contain any exception or create any limitation to its applicability. Hence, it applied to all racial imbalances, regardless of whether they resulted from de jure or de facto segregation. Since "all legislative powers granted to the United States" is vested in Congress by by Article I, Section 1 of the Constitution, the subsequent nullification of the proviso by federal courts and federal executive officers constituted a gross usurpation of power denied them by the Constitution and statutes they were professing to interpret.

An illuminating colloquy concerning the proviso occurred between Senator Hubert H. Humphrey, the floor manager of the Civil Rights Act of 1964 in the Senate, and Senator Robert C. Byrd, on the floor of the Senate on June 4, 1964 during consideration of the Civil Rights Act of 1964.

Senator Byrd was distressed by the possibility that Title VI of the Act, which primarily governed state programs receiving federal financial assistance, might be utilized by federal courts or federal officers to coerce state school boards to engage in the forced busing of students.

Senator Byrd put this question to Senator Humphrey: "Can the Senator from Minnesota assure the Senate from West Virginia that under Title VI school children may not be bused from one end of the community to another end of the community at the taxpayers' expenses to relieve so-called racial imbalance in the schools."

Senator Humphrey replied: "I do."

The colloquy continued as follows:

Senator Byrd: "Will the Senator from Minnesota cite the language in Title VI which would give the Senator from West Virginia such assurance?"

Senator Humphrey: "That language is to be found in another title of the bill, in addition to the assurances to be gained from a careful reading of Title VI itself.".

Senator Byrd: "In Title IV?"

Senator Humphrey: "In Title IV of the bill."

Senator Byrd: "Will the Senator from Minnesota read that language in Title IV?"

Senator Humphrey: "Yes, I would be happy to do so. The provision merely quotes the substance of a recent court decision -- the so-called Gary Case."

Senator Humphrey thereupon stated that the language under consideration was embodied in the proviso in Section 407(a), and read to Senator Byrd and the other members of the Senate the proviso verbatim in its entirety. The colloquy continued:

Senator Byrd: "What does the word 'herein' mean?"

Senator Humphrey: "It means within the Act."

Senator Byrd: "Does it mean the act or the title?"

Senator Humphrey: "It means the act. If the Senator would like to offer an amendment, if he believes we have not been sufficiently precise, I wish he would do so. As Senator in charge of the bill, I would entertain such an amendment."

Senator Byrd: "But would the Senator from Minnesota also indicate whether the words 'provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance' would preclude the Office of Education (of the Department of HEW), under Section 602 or Title VI from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?"

Senator Humphrey: "Yes. I do not believe in duplicity. I believe that if we include the language in Title IV, it must apply throughout the act."

After elaborating the fact that the drafters of the proviso had modeled it on the language of Judge Beamer's opinion in Bell v. School Board of Gary, (D.C. Indiana, 1963) 213 F.Supp. 819, Senator Humphrey assured Senator Byrd in particular and the Senate in general that the proviso forbade federal courts and federal executive officers to require state school boards to bus students to effect the racial integration of schools. He did so by assertions which are intellectually indisputable. He said:

> "I should like to make one further reference to the Gary Case. This case makes it clear that while the Constitution prohibits discrimination, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems."[31]

The Green Case

While the "separate but equal doctrine" was deemed constitutional, New Kent County in rural Virginia maintained two racially segregated schools, one a combined elementary and high school for blacks known as Watkins School and the other a combined elementary and high school for whites known as New Kent School.

In 1965, the County School Board of New Kent County adopted a freedom-of-choice plan for the assignment of children to its schools. This plan permitted every child, regardless of his race, to attend whichever school he chose, and provided him free transportation to enable him to do so.

In exercising their freedom of choice, all of the white students and 15 percent of the black children decided to attend New Kent School, and 85 percent of the black children elected to attend the Watkins School.

The Supreme Court repudiated the freedom-of-choice plan of New Kent County as unconstitutional under the equal protection clause in Green v. County School Board of New Kent County, (1968) 391 U.S. 430.

Although Title IV of the Civil Rights Act of 1964 had been the supreme law of the land for almost four years, the Green Case totally ignored its provisions, and dismissed the Act as a whole with the nonchalant remark that it simply indicated that Congress was "concerned with the lack of progress in school desegregation."[32]

When I was a small boy, my father, who revered the rule of law, took me to the old Supreme Court room in the Capitol at Washington and told me: "Here is where the Supreme Court sits. The Supreme Court will be faithful to the Constitution though the heavens fall." As a result of this childhood experience, I do not find it easy or pleasant to be critical of the Supreme Court, even when it practices verbicide on the words of the Constitution.

I have scrutinized the opinion in the Green Case on many occasions, and will reluctantly comment on it with complete candor.

The opinion reflects anger rather than calm reasoning, and illustrates judicial activism and verbicide run riot. It is replete with specious arguments which bear virtually no relationship to the constitutional provision it undertakes to construe and apply.

It ignores the plain words of that provision which expressly restrict their coverage to the states, and applies them to those individuals who happen to be school children in assignment cases. It does this by adjudging that the equal protection clause denies these individuals the freedom to choose the schools they attend.

Its language reveals why the Justices impose this limitation upon the freedom of the children. The Justices apprehend that their natural inclination to have daily associates who are members of their own race will deter both black and white children from voluntarily mixing themselves in the schools in racial proportions pleasing to the Justices.

The opinion claims that the Court is merely applying the Brown Case and its implementing decision, Brown II, (1955) 349 U.S. 483. The Green Case does recognize these rulings of the Brown Case: First, the equal protection clause does make racial discrimination in public education unconstitutional; and second, that the equal protection clause confers no power whatever on the federal government to take any action in respect to the assignment of children to state schools unless the state discriminates against a child by excluding him from one of its schools on account of his race.

Otherwise the Green Case is totally repugnant to the Brown Case. It rejects the ruling of the Brown Case that the equal protection clause requires the state to ignore race in assigning children to its schools and to make such assignments solely on a non-racial basis, and adjudges that the clause compels the state to give priority to the race of children in assigning them to its schools and to make such assignments on a racial basis.

It also rejects the ruling of the Brown Case that the equal protection clause merely employers the federal government to prohibit an offending state from practicing further racial discrimination, and adjudges that the clause imposes upon an offending state the affirmative obligation to integrate all its schools racially.

The Green Case creates a special rule for the 11 states of the old Confederacy and the six nearby border states which were maintaining dual systems of racially segregated schools on May 17, 1954. These states, it declares, must destroy "root and branch" all vestiges of past racial discrimination by converting their former dual systems into unitary school systems. This obligation is consummated, it further declares, only when the racial mixture in its schools renders them unidentifiable as "white schools" or "negro schools" and makes them identifiable solely as "just schools."

The Supreme Court has subsequently defined a unitary school in less lucid terms as one in "which no person is to be effectively excluded from any school becauee of race or color."[33]

The Supreme Court's invalidation of freedom-of-choice in the Green Case cannot be reconciled with this definition. After all, however, judicial aberrations can never be reconciled with constitutional government.

The Green Case illustrates in graphic fashion the tragic truth that many men of good intentions entertain an insatiable desire to impose their personal notions on others, and cannot be safely trusted with unlimited and unsupervised governmental power.

The subsequent non-busing decisions of the Supreme Court followed the Green Case. They accepted its philosophy that the Constitution is color conscious rather than color blind, and its ruling that the equal protection clause obligates an offending state school board to take affirmative action to mix the races in its schools if both black and white children reside within its jurisdiction.

Inasmuch as they follow the Green Case, a detailed analysis of those subsequent cases would not increase an understanding of the problems arising out of the forced busing of school children for integration purposes. Hence, further reference to them is omitted.

Chastising the South

I use the term South to embrace the States of the Old Confederacy and the nearby border states having similar school laws. These states did not possess sufficient prophetic power to know in advance that the Brown Case was going to invalidate as unconstitutional under the equal protection clause the "separate but equal" doctrine which had been held valid in all governmental circles, federal and state, during the preceding 86 years. Consequently, they were still operating legally segregated dual systems of schools on May 17, 1954, the day of the Brown decision.

The compulsory integrationists initiated their activities by concentrating on the segregated schools of the South and disregarding segregation in schools elsewhere. By so doing, they enlisted the aid of politicians in other parts of the nation who found it politically profitable to chastise the distant South for its actual or supposed sins, and to ignore the similar shortcomings of those exercising governmental power in their own states.

The compulsory integrationists and their allies were delighted with the Green Case because it gave the Supreme Court's blessing to the chastisement of the South. In it, the Supreme Court Justices invented drastic new rules applicable to the South only, and ordered inferior federal courts sitting in the South to abandon the "deliberate speed approach" of Brown II, and compel state school boards in the South to obey the new rules at once.

Acting under the Green Case and subsequent Supreme Court decisions following it, federal courts sitting in the South and federal agencies, notably

HEW, required state school boards to take various actions, some quite artificial and some quite expensive to state taxpayers, which they deemed likely to speed racial integration in their schools.[34]

I enumerate some of their requirements. They compelled state school boards to deny hundreds of thousands of children, black and white, admittance to their nearest schools, and to attend what they called satellite schools which they "clustered, grouped, or paired" with their neighborhood schools, often in distant and non-contiguous areas; to restructure the boundaries of districts and attendance zones to secure the maximum amount of racial mixing, often in ways incompatible with the terrain and customary routes of travel; to close existing schools in communities inhabited by families of one race, and to consolidate their student bodies with those of student bodies in schools in communities populated by families of the other race; and to build new schools in or adjacent to areas where families of both races resided.

All too often the interests and well being of children, parents, taxpayers, and education were sacrificed to accomplish integration.

While the South was being treated in this fashion, the Supreme Court, inferior federal courts sitting in other parts of the land, and federal agencies virtually ignored racial segregation in the schools of the North, the East, and the West, notwithstanding such segregation in schools of their inner cities was usually far more pronounced than in southern communities.

Even after they abandoned "the separate but equal" doctrine in good faith and opened their schools without discrimination to students of all races, schools boards in the South found little surcease from chastisement. This was true because racial imbalances in Southern schools were presumed to result from de jure segregation, while racial imbalances in Northern, Eastern or Western schools were either ignored or presumed to be caused by de facto segregation.

The disparity of treatment of the various areas of our country justifies this caustic comment. While the American Creed was proclaiming that our land was "one nation under God", the Supreme Court and federal agencies were ruling that the South and other parts of our country were not one nation under the Constitution.

The disparity of treatment prompted Senator John C. Stennis and me to offer two amendments, which passed the Senate. My amendment decreed that rules of evidence in school desegregation cases in all federal courts should be uniform. The Stennis Amendment commanded federal courts and agencies to apply to school segregation throughout the country identical regulations.

The Stennis Amendment provoked an indignant outcry from a few Northern Senators. Thereupon Senator Abraham Ribicoff, of Connecticut, as just a man as ever sat in the Senate, arose in support of the amendment. He declared, in essence, with much eloquence that the Stennis Amendment placed a mirror before Senators who favored integration in the South and disfavored it in the North, and enabled them to see their hypocrisy.

Forced Busing

I digress momentarily to emphasize a relevant psychological truth.

When contending groups who entertain different views and seek different ends use the same words to express their contradictory ideas and aims, they produce a lack of public understanding of their differences and the impact which the triumph of one group or the other will have on the way of life of our country.

Advocates and opponents of compulsory integration of schools have used the same word, "desegregation", to express their irreconciliable ideas and incompatible goals. The federal judiciary has added to the lack of public understanding by using the same word, "desegregation", as if it had a single definite meaning.

Opponents of compulsory integration habitually attribute to the word "desegregation" a meaning identical with that given to it by the Supreme Court in the Brown Case and Congress in Title 4 of the Civil Rights Act of 1964. To them, "desegregation" means the assignment of pupils to state schools without regard to their race. To the compulsory integrationists, on the contrary, "desegregation" means the assignment of students to state schools because of their race.

The differences between the two groups are not mere matters of semantics. They reflect a most serious conflict of ideas and demands in respect to the governmental powers delegated to the federal government and reserved to the states by the Constitution, and with respect to whether the Constitution forbids or countenances federal tyrannies which rob innocent children and their inoffending parents of freedom.

The contending groups agree on only one proposition, i.e., that the equal protection clause confers no power upon the federal government to take any action concerning the assignment of students to state schools unless the state commits racial discrimination by denying a child admittance to one of its schools solely on account of his race.

The contending groups insist, however, that the equal protection clause confers on the federal government totally divergent powers in respect to a state school board if it is guilty of racial discrimination in the manner specified.

According to the opponents of compulsory integration, the equal protection clause directs the federal government to require the offending state school board to remedy the consequences of its racial discrimination and to refrain from racial discrimination in the future; and according to the advocates of compulsory integration, the equal protection clause compels the federal government to assume complete control of the assignment of students to schools subject to the jurisdiction of the offending school board, and to compel the board to assign students to its school in racial proportions to the maximum extent feasible.

I return to the narration of events.

Notwithstanding its drastic nature, the Green Case was not calculated to produce integration in the schools of the South to a degree pleasing to compulsory integregationists.

Their desire was frustrated by two factors. One, which had its genesis in what seems to be an inborn human characteristic, was the custom of American families of all races to establish their homes in communities inhabited by families of their respective races; and the other, which had its origin in a dislike for compulsory integration, was the tendency of American white families to flee from the inner cities to the suburbs.

Segregation in public schools resulting from these factors is obviously de facto segregation. It is caused by the exercise of free choice by individuals and not by segregative acts of state school boards.

Nevertheless, the origin of segregation in the public schools of these racially segregated residential communities has not usually exempted their schools from federal regulation under the principle that de facto segregation in state schools is not subject to federal jurisdiction. This has been true because these schools have ordinarily been located in state school districts larger than the residential communities they serve. As a consequence, the federal government has usually been able to assume jurisdiction over them either on the basis of evidence of racial discrimination in other schools of their district or on the basis of the assumption that the segregation in them represented racial imbalances presumed to result from the segregative acts of school boards.

The only practicable way for the federal government to integrate state schools in residential communities racially segregated by the voluntary choices of their places of abode by their inhabitants is to resort to forced busing of students.

The forced busing of students for these purposes involves these two successive acts of compulsion: First, denying school children admittance to their neighborhood schools; and, second, assigning and transporting them to schools elsewhere.

Although various reasons are given for it, the real objective of forced busing is to integrate the bodies rather than to enlighten the minds of school children.

Ordinarily forced busing involves an exchange of black and white children. Black students are barred from their neighborhood schools, and compelled to attend schools in communities inhabited by whites; and white schildren are barred from their neighborhood schools and compelled to attend schools in communities populated by blacks.

On April 20, 1971, the Supreme Court handed down its decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1. By this decision, the Supreme Court adjudged for the first time that the federal judiciary may constitutionally employ forced busing as a tool of school desegregation.

The Swann Case was originally heard by Chief Judge J. Braxton Craven, Jr. in 1965. He ruled that the geographic zoning plan of the Charlotte-Mecklenburg Board of Education satisfied the equal protection clause as it had been interpreted in the Brown Case. In so ruling, he made this observation:

> "This is another school case. Our adversary system of justice is not well-adapted for the disposition of such controversies. It is to be hoped that with the implementation of the 1964 Civil Rights Act the incidence of such cases will diminish. Administrators, especially if they have some competence and experience in school administration, can more likely work out with School Superintendents the problem of pupil and teacher assignment in the best interests of all concerned better than any District Judge operating within the adversary system. The question before this court, even within its equitable jurisdiction, is not what is best for all concerned but simply what are plaintiffs entitled to have as a matter of constitutional law. What can be done in a school district is different from what must be done."35

After Judge Craven's sound ruling, the Supreme Court handed down its decision in the Green Case and similar decisions in Monroe v. Board of Commissioners, (1968) 391 U.S. 430, Alexander v. Holmes County Board of Education, (1969) 396 U.S. 19; and Carter v. West Felicana Parish School Board,

(1970) 396 U.S. 1032. These cases ruled that state school boards in the South had an affirmative duty to eradicate at once "root" and "branch" all vestiges of segregation resulting from their former dual systems of schools and that they could do this only by mixing the races in their schools without delay to the maximum degree feasible.[35]

The Constitution had not been changed since Brown, but the Supreme Court Justices had altered their notions as to what was constitutional or desirable.

The Supreme Court did not spell out the rationale underlying its new decisions, or the reason why the Constitution now covered the South in a different way from the North, East, and West.

The inference concerning the rationale underlying the new judicial fiat was nevertheless inescapable. It was that the South had been practicing racial discrimination during all the times it had relied upon the "separate but equal doctrine", even though Supreme Court Justices had not been smart enough to know it until May 17, 1954, the day of the Brown Case.

Despite the humor in it, this rationale was legally sound. As Dean Samuel F. Mordecai, of the old Trinity (now Duke University) Law School, was wont to say: "The law makes queer distinctions between the obligations it imposes on different categories of men. It requires the layman to know all the law, and the lawyer to know a reasonable amount of the law. But it doesn't require the judge to know a damned thing."

After the Supreme Court handed down the Green, the Monroe, the Alexander, and the Carter Cases, the Swann Case was reinstituted, and James B. McMillan, a conscientious and erudite United States District Judge, heard it.

As one of the inferior members of the federal judicial hierarchy, Judge McMillan was required to follow and apply in the re-instituted Swann Case the new rulings of the head of the federal judicial hierarchy, the Supreme Court.

The defendant in the Swann Case, the Charlotte-Mecklenburg Board of Education, had administrative jurisdiction of the Charlotte-Mecklenburg School system, which encompassed the City of Charlotte and Mecklenburg County, N. C., served the educational needs of the more than 600,000 people residing in them, and was the 43rd largest public school system in the United States.

The area allotted to the system was large, comprising 550 square miles and extending 22 miles east-west and 36 miles north-south. Seventy one percent of the people inhabiting the area were white and the other 29 percent were black.

The Charlotte-Mecklenburg School system operated 109 schools, and served more than 84,000 pupils. Of the 24,000 black children attending these schools, 21,000 attended schools within the City of Charlotte, and two-thirds of those 21,000 -- about 14,000 -- attended 21 schools, where the student bodies were either totally or more than 99 percent black.

After protracted hearings, Judge McMillan ruled that the Charlotte-Mecklenburg Board of Education was impermissibly operating a dual system of schools in violation of the Green Case and like decisions, and entered a "desegregation order" requiring it to assign administrators, teachers, and students to the schools throughout the system as nearly as practicable in racial proportions corresponding to the population of the area, i.e., 71 percent white and 29 percent black.

By Judge McMillan's order, the Charlotte-Mecklenburg Board of Education was mandated to bus thousands of students an average "daily round-trip" approximately "15 miles through central city and suburban traffic" to mix the races in its schools. Many of them were little tots.[37]

By the desegregation order, the Charlotte-Mecklenburg Board of Education was specifically commanded to do these things:

1. To deny thousands of students, both black and white, admission to their neighborhood schools.

2. To assign these children to clustered, grouped, paired, or satellite schools throughout the area in the racial percentages specified insofar as that was practicable.

The order expressly commanded that the Charlotte-Mecklenburg Board of Education transport to the schools to which they were assigned all students who did not live within walking distance of such schools.

The defendant appealed from the order to the United States Court of Appeals for the Fourth Circuit, which vacated the order and remanded the case to the District Court for further proceedings conforming to its opinion.

Although it deemed the order to be required in most respects by the decisions in the Green Case and those following it, the Circuit Court's ruling was based on its conviction that the busing it mandated was excessive, and for that reason not required to make the Charlotte-Mecklenburg system a "unitary" system within the purview of the Green and kindred cases. As the Circuit Court pointed out, the order increased by 39 percent for integration purposes the busing being used by the school board for educational purposes, and necessitated an increase of 32 percent in the school board's fleet of buses.[38]

The Supreme Court reversed the case on certiorari, and upheld Judge McMillan's order in its entirety.

Before discussing the constitutional infirmities in its ruling respecting the forced busing of school children for integration purposes, it is advisable to note what the Supreme Court adjudged in the Swann Case in respect to the other questions presented to it.

Like the opinions in the Green, Monroe, Alexander, and Carter Cases, the Supreme Court opinion in the Swann Case pays lip service to the Brown Case by asserting that it is following the decision in it. It does quite rightly assert that the federal judiciary acquires no power under the equal protection clause unless the state school board violates the clause (page 15); that its power in such case is limited to correcting the condition that offends the clause (page 15); and that its function in exercising its power is merely "to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race"(page 23).

After making these assertions, the Supreme Court repudiated the Brown Case, and adjudged that when a state school board violates the equal protection clause its constitutional obligation to assign students to its schools without regard to race is forthwith converted into a constitutional obligation to assign all students to its schools on the basis of race and in so doing to mix them racially to the maximum extent feasible.

To decree this metamorphosis of the equal protection clause, the Supreme Court perverted the words and objective of the equal protection clause and nullified section 401(a) of the Civil Rights Act of 1964 (42 U.S.C. section 2000c).

It perverted the words and objective of the equal protection clause by converting its prohibition of racial discrimination to separate the races into a requirement of racial discrimination to mix them.[39]

Section 5 of the Fourteenth Amendment provides that the Congress shall have the power to enforce, by appropriate legislation, the provisions of the Amendment.

When Congress enacted Title IV of the Civil Rights Act of 1964, it exercised this power insofar as it relates to the assignment of students to state schools. Its purpose in so doing was to define the role of the federal government in what had become known as "desegregation" of the schools, and restore a measure of racial peace to an America troubled by the bitter controversies between compulsory integrationists and die-hard segregationists in respect to public school systems.

Section 401(a) of Title IV of the Civil Rights Act of 1964 (42 U.S.C. section 2000c) was in perfect rapport with the equal protection clause when it described desegregation as the assignment of students to state schools without regard to race. Consequently, it constituted the supreme law of the land under Article VI of the Constitution.

Hence the Supreme Court unconstitutionally nullified the supreme law of the land and thwarted the effort of Congress to bring some peace to a troubled America when it repudiated the definition of "desegregation" set out in section 401(a) of the Civil Rights Act of 1964 (42 U.S.C. section 2000c), and decreed that "desegregation" is the assignment of students to state schools on a racial basis.

Inasmuch as it holds that the forced busing of students is a constitutionally permissible way to integrate state schools, the Supreme Court decision in the Swann Case has other infirmities.

Two of its additional constitutional infirmities may be epitomized as follows:

1. The Swann Case adjudges that the federal judiciary has power to compel state school boards to violate the equal protection clause.

2. The Swann Case rules that the federal judiciary has power to apply the equal protection clause to individuals, notwithstanding its coverage is expressly restricted to states and state officials.

When it enters a forced busing decree, the federal district court initially commands the school board to divide the students in a particular district or attendance zone into two groups; to permit the students of the first group to attend their neighborhood schools in the district or zone; and to deny the students in the second group admission to such neighborhood schools.

The most sophisticated sophistry cannot wash out the plain truth that this initial command requires the school board to treat the students in the two groups, who are similarily situated because of their residences in the same district or zone, in a different manner, and that is exactly what the equal protection clause was put in the Constitution to prevent.

The forced busing decree secondarily commands the state school board to assign the students in the second group to schools in other areas and to transport them by buses to the schools to which it assigns them in order either to decrease the number of children of their race in their neighborhood schools or to increase the number of children of their race in the schools elsewhere.

Again, the most sophisticated sophistry cannot wash out the plain truth that the second command of the forced busing decree requires the state school board to deny the students in the second group admission to their neighborhood schools solely on account of their race,and that is exactly what the Supreme Court rightly ruled in the Brown Case is a violation of the equal protection clause.

A sound rule of constitutional and statutory construction is embodied in the Latin phrase expressio unius est exclusio alterius, meaning the expression of one thing is the exclusion of another. The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Mainifestly the clause applies exclusively to states and public officers acting for them, and excludes individuals from its coverage.

Notwithstanding this, the forced busing decrees of federal district courts apply the equal protection clause as it is now interpreted by the Supreme Court to hundreds of thousands, perhaps millions, of public school students and their parents each school day. To maintain otherwise is to deny and defy obvious truth.

When it enters a forced busing decree, the federal district court orders the state school board to integrate its schools by the two-fold process of denying selected groups of students admission to their neighborhood schools and by busing them to other schools elsewhere. These decrees clearly apply to these students and their parents because they subject them to punishment for contempt of court if they disobey them or obstruct their execution.

The direct application to the students of the first step in forced busing, i.e., their exclusion from their neighborhood schools, is too obvious to require any explanation. The application to students and parents of the second step, i.e., the busing itself, is more intricate, and is made more understandable by some elaboration.

While the judges responsible for the forced busing decrees are still snug in their beds, the parents of the students to whom the decrees apply are compelled to arise from their beds, and to arouse their children from their slumbers, prepare and serve them breakfasts, and send them outdoors, no matter how inclement the weather may be, to await the arrival of the buses. The students, who are often small tots, are compelled to take round trips, which are often long and wearisome, each school day between their homes and often distant schools in other communities. All of this is done to mix the bodies of the students in racial proportions the federal judiciary deems desirable.

Such unrestrained exercise of judicial power, I submit, has no rightful place in an America, which boasts in its national anthem that it is the land of the free, unless it is indispensable to the nation's well being.

No such case can be made for forced busing of students for integration purposes.

Let us examine the reasons advanced by the advocates of forced busing to justify it.

In the ultimate analysis, they are two in number. The first one, which is untrue as well as a rank insult to blacks, is that black children cannot possibly acquire an adequate education unless they have the coerced companionship of white children while they are attending school.

The second reason is that schools in communities predominantly inhabited by whites are academically superior to the schools in communities predominantly populated by blacks; that black children are, therefore, denied educational opportunities equal to those of white children; and that the only way to remedy past deficiencies in the education of black children and to secure them educational opportunities equal to those of white children is forced busing, which transfers some black children from inferior schools in black communities to superior schools in white communities, and some white children from superior schools in white communities to inferior schools in black communities. Advocates of forced busing exhibit no concern for the plight of the white children who are transferred by it from superior schools in white communities to inferior schools in black communities. They are indifferent to the inescapable conclusion that on the basis of their own premise this forced busing denies these children equal educational opportunities.

The reasons assigned by the advocates of forced busing are specious and not authentic. The only intelligent remedy for past deficiencies in education is remedial education; and the only intelligent way to secure equal educational opportunities for all children, black and white, is to establish adequate schools in all areas.

The substitution of forced busing for intelligent solutions of educational problems calls to mind the remark of Pope Julius III to the Portugese monk: "Learn, my son, with how little wisdom the earth is governed."

In an effort to make forced busing more acceptable, the opinion of the Supreme Court in the Swann Case observed that the District Court had found that the forced busing trips of most elementary school students would take "not over 35 minutes at the most", and that about 39 percent of the nation's public school children were "transported to their schools by bus in 1969-1970 in all parts of the country."

The District Court's finding respecting the time required for the forced busing trips of elementary school students, it seems, was applicable to one way rather than round trips. Be this as it may, it did not embrace the time spent by such students at both ends of their journeys waiting for buses. The time expended in waiting for buses and traveling on them, I submit, is wasted, and ought to be utilized to enlighten their minds in classrooms in schools nearest their homes.

To be sure, state school boards necessarily bus multitudes of students from distant homes to the nearest schools available to them for educational purposes. The distinction between necessary busing for educational purposes and the unnecessary and wasteful forced busing sanctioned by the Supreme Court in the Swann Case is as wide as the gulf which yawns between Lazarus in Abraham's bosom and Dives in hell. The untold millions of dollars wasted in financing forced busing ought to be spent to improve school facilities, enlarge the teaching skills of teachers, and to provide students with learning aids.

The opinion of the Supreme Court in the Swann Case stamps with its approval the judicial discrimination of applying different rules of evidence to desegregation cases in the South and those in other parts of the nation. It does so by this ingenious observation: "In a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition."

A case can be made for the proposition that the Supreme Court's decision in the Swann Case also violated the supremacy clause of Article VI of the Constitution when it nullified the proviso of Section 407(a) of the Civil Rights Act of 1974 (42 U.S.C. section 2000c-6). This proviso forbids federal officers and courts to order transportation of students to achieve a racial balance in any school.

The defendant in the Swann Case had invoked this proviso as a prohibition on forced busing for integration purposes.

As the colloquy of June 6, 1964, between Senator Humphrey, the Senator in charge of the legislation in the Senate, and Senator Byrd, of West Virginia, and all the other legislative history of the legislation, reveals, Congress actually intended this proviso to outlaw forced busing for integration purposes. Moreover, a case can be made for the proposition that the words of the proviso, properly interpreted, sufficed to achieve this congressional purpose.

Be this as it may, the Supreme Court nullified the proviso of Section 407(a) as it had the rightful definition of desegregation of Section 401(a) by arguments totally incompatible with both the words and the legislative history of these sections.

The first of these arguments was self-contradictory. It was that Congress enacted these sections "not to limit but to define the role of the Federal Government in the implementation of the Brown I decision." How Congress can define the role, i.e., the function, of the federal government in a particular activity without defining the limits of its powers in respect to that role is a linguistic impossibility.

The second of these arguments is equally as baffling. It was that Congress inserted the proviso in Section 407(a) "to foreclose any interpretation of the Act as expanding the existing powers of federal courts to enforce the Equal Protection Clause." After stating this argument, the Supreme Court promptly expanded the powers of the federal judiciary in this respect by nullifying the limitation the proviso imposed on federal officers and federal courts.

In the final analysis of its confusing words, the third of these arguments was that in enacting the nullified sections, Congress was a bunch of legislative fools attempting to regulate something it had no constitutional authority to regulate, i.e., de facto segregation.[40]

During the times when the Supreme Court was concerned about racial segregation in public schools in the South and was ignoring racial segregation in public schools in other regions, I offered amendments to an education bill to outlaw forced busing for integration purposes.

In arguing unsuccessfully for the adoption of these amendments, I stated, in substance, that I wanted to warn Northern, Eastern, and Western Senators that when the compulsory integrationists had reduced the South to a state of total vassalage, they would not emulate Alexander the Great and weep because there were no more worlds for them to conquer; but that, on the contrary, they would direct their efforts to the public schools of the North, East, and West.

My prophesy proved true. The Supreme Court finally realized that the equal protection clause applies to other parts of the country as well as to the South, and that forced busing constituted the only practical way of mixing the races in the public schools of the North, East, and West.

After the federal courts in these areas began to assume jurisdiction of suits for forced busing, a highly respected Northern Senator, who had spoken and voted against my amendments, offered a proposal to amend the Constitution to prohibit the forced busing of students to integrate public schools. I thereupon went to him and made this private comment: "I'm glad you've seen the light." He made this private response to me: "Yes. It's just as you predicted. They're goring my ox now."
rendered a number of other rulings upholding federal district court orders requiring the forced busing of public school students to integrate school systems in virtually all sections of the country where people of different races reside. These rulings are subject to the same infirmities as the Swann Case, and require no analysis in detail.[41]

The federal district courts, which are compelled to implement the Supreme Court's perversion of the equal protection clause, have not monopolized forced busing as an integrating tool. On the contrary, some federal officers have employed it on a massive scale.

From time to time, Congress has enacted laws authorizing grants of federal funds to state school boards to aid them in educating public school students, and has entrusted to federal executive agencies, such as HEW and the newly-created Department of Education, the power to administer these grants in conformity with the congressional intent.

Congress enacted Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d) to prevent discrimination in federal assisted programs, and not to achieve the integration of state schools. In so doing, it acted in harmony with the true meaning and real objective of the equal protection clause. This section provides:

> "No person in the United States shall, on account of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Unfortunately for constitutional government and freedom, federal executive agencies sometimes delegate the power to administer the grants Congress makes for educational purposes to officers employed by them who are, in reality, crusading bureaucrats. A crusading bureaucrat may be defined as a non-elected federal officer who exercises a mile of power for every inch of authority bestowed on him.

All too often the crusading bureaucrats to whom federal executive agencies delegate their power to administer congressional educational grants are, in reality, compulsory integrationists. They pervert the statutory prohibition of racial discrimination by state school boards receiving federal financial assistance into a positive command that all state school boards applying for or receiving such assistance must be racially integrated to the maximum extent feasible or at least in racial proportions pleasing to them.

They make their perversion of the Act of Congress effective by exploiting in alternative ways the financial needs of state school boards. They make grants without delay to school boards which willingly yield to their integrating objective and withhold or threaten to withhold grants from those which refuse or are reluctant to do so.

The Obligation of the President and Congress

Federal courts and federal officers are perpetrating these tyrannies on people of all races in all parts of our country where substantial numbers of children of diverse races live. Despite their pretenses to the contrary, they are seeking to compel racial integration, and not to prevent racial discrimination.

The tyrannies have no rightful place in an America which claims to be the land of the free. They are unconstitutional, wasteful, and useless. They ought to be ended. Those victimized by them cannot end them. But the President and Congress can.

The President and the members of Congress are bound by their oaths to support constitutional government and protect freedom. For this reason, they have the positive duty to end these tyrannies.

They ought not to be deterred from doing their duty because these tyrannies have been sanctioned by Supreme Court decisions. On the contrary, this fact should impel them to act without delay to end the tyrannies. They are the only beings on earth who possess the lawful power to do so.

Supreme Court decisions are the handiwork of fallible men. There is nothing sacrosanct in them. Supreme Court decisions merit respect only if they are respectable, and they are not respectable when they flout the true meaning and real objective of the equal protection clause.

The power of the President, acting alone, to end these tyrannies is more limited than that of the Congress. He has undoubted power, however, to end the tyrannies of the officers of the executive branch of the federal government. They are merely assisting him in performing his constitutional duty to take care that the laws of the nation are faithfully executed, and he can stop them from perverting those laws by annexing to them conditions reputnant to the congressional intent.

The power of Congress to end these tyrannies is virtually unlimited. The Founding Fathers knew the tragic truth that some public officials love power and are prone to abuse it, and inserted in the Constitution provisions adequate to prevent such abuse.

Article I, section 1, of the Constitution vests in Congress "all legislative powers" of the federal government. Hence, Congress may enact new laws sufficient to compel officers of the executive branch of the federal government to stop perverting old laws.

The Constitution confers upon the federal judiciary authority to restrain unconstitutional exercise of power by Congress, and upon Congress authority to restrain the unconstitutional exercise of power by the federal judiciary.

This assertion is undoubtedly shocking to some, especially compulsory integrationists, who believe the federal judiciary to be omnipotent and Congress to be impotent in the area under consideration.

Section 5 of the Fourteenth Amendment authorizes Congress to enforce, by appropriate legislation, the provisions of the equal protection clause, and Article III of the Constitution empowers Congress to regulate the jurisdiction of all federal courts inferior to the Supreme Court and the appellate jurisdiction of the Supreme Court itself.[42]

By virtue of these constitutional provisions, Congress has virtually complete power to enact laws specifying how the equal protection clause is to be enforced in accordance with its true meaning and real objective, and defining the jurisdiction of the federal courts in a manner requiring them to act accordingly.

By implementing these constitutional provisions in this way, Congress can put a virtual end to the judicial and bureaucratic tyrannies under consideration.

While I was serving in the Senate, I made remarks explaining these constitutional provisions, and introduced a bill which was aptly designed to use them to end these judicial and bureaucratic tyrannies. My remarks and bill are set out in pages 33,033 to 33,041 of the Congressional Record for November 5, 1969. I reintroduced the bill on other occasions with the co-sponsorship of Senator James B. Allen, of Alabama, one of the nation's wisest and most courageous Senators of all time.

In closing, I pray that the President and the Congress will prove their devotion to constitutional government and the freedom of Americans by ending the judicial and bureaucratic tyrannies I have been discussing. They cannot perform a more important task. When all is said, tyranny in a Republic is far more reprehensible than tyranny in a Monarchy.

NOTES

1. The Constitution, Fourteenth Amendment, Section 1.

2. William Ewart Gladstone: Kin Beyond The Sea, North American Review, September-October, 1878.

3. The Writings and Speeches of Daniel Webster, National Edition, Vol. 2, page 165.

4. George Washington: Farewell Address.

5. Ex Parte Milligan,(1866) 4 Wall. (U.S.) 2, 120-121.

6. Ibid.

7. James Madison: The Federalist No. 43.

8. Frankfurter, J.: Ullman v. United States, (1956) 350 U.S. 422, 428.

9. Cardozo, C.J.: Sun Printing and Publishing Association v. Remington Paper and Power Company, 235 U.S. 338, 139 N.E. 470. See, also, West Coast Hotel Co. v. Parrish, (1937) 300 U.S. 379, where Justice Sutherland stated in a dissent: "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'Supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections. If the Constitution, intelligently and

reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation -- the only true remedy -- is to amend the Constitution."

10. The Constitution, in its entirety, and Amendment X.

11. The Constitution, Articles I, II, and III.

12. The Constitution, Articles III and VI.

13. Marbury v. Madison, (1803) 1 Cr. (5 U.S.) 137, 176-180.

14. Gibbons v. Ogden, (1924) 9 Wheat (22 U.S.) 1, 188.

15. Dr. Oliver Wendell Holmes: Autocrat of the Breakfast Table, (The Limited Editions Club 1955) Chapter I, page 9.

16. United States v. Butler, (1936) 297 U.S. 1, 78.

17. I cannot provide a citation for Daniel Webster's comment. I found it many years ago among his papers. I copied it, but did not note at the time where I discovered it. After seeking in vain to discover the occasion of its making, I requested the Library of Congress to research the question. The Library advised me that it was unable to solve the problem because Webster's papers are so inadequately indexed.

18. Judge Thomas M. Cooley: Constitutional Limitations, 8th ed., page 124.

19. Benjamin N. Cardozo: The Nature of the Judicial Process, pp. 68, 136.

20. Justice Frankfurter: Bridges v. California, (1941) 314 U.S. 252, 289.

21. Alpheus Thomas Mason: Harlan Fiske Stone, Pillar of the Law, (1968 edition) page 398.

22. What I say is the true meaning and real objective of the equal protection clause has been established by indisputable sound decisions of the Supreme Court, the inferior federal courts, and state courts. These decisions are virtually past numbering. I cite only a few of the sound Supreme Court cases: Hernandez v. Texas, (1954) 347 U.S. 475; Truax v. Corrigan, (1921) 257 U.S. 312; Buchanan v. Warley, (1917) 245 U.S. 60; Kentucky v. Powers, (1906) 163 U.S. 228; Yick Wo v. Hopkins, (1896) 118 U.S. 356; and Civil Rights Cases, (1883) 109 U.S. 3. See, also, Banks v. Housing Authority of San Francisco, 120 Cal. App. 2d 1, 260 P.2d 668, cert. den. 347 U.S. 974.

23. Constitution, Fourteenth Amendment, Section 1.

24. It is rightly stated in footnote 57 on page 775 of 16A American Jurisprudence, 2d Series, that "the decisions supporting this proposition are virtually limitless in number." It is also rightly stated in the same footnote that the following decisions "is a small sampling of them": Hartford Steam Boiler Inspection and Insurance Co. v. Harrison, (1937) 301 U.S. 459; Old Dearborn Distributing Co. v. Seagram Distillers Corp., (1936) 299 U.S. 183; Colgate v. Harvey, (1935) 296 U.S. 404; State Board of Tax Commissioners v. Jackson, 283 U.S. 527; and Corporation Commission of Oklahoma v. Lowe, (1930) 281 U.S. 431.

25. District of Columbia v. Carter, 409 U.S. 418; Moose Lodge No. 107 v. Irvis, 407 U.S. 162; United States v. Price, 383 U.S. 787; Burton v. Wilmington Parking Authority, 365 U.S. 715; Snelly v. Kraemar, 334 U.S. 1; United States v. Classic, 313 U.S. 299; Nixon v. Condon, 286 U.S. 73; Iowa-Des Moines National Bank, 284 U.S. 239; Corrigan v. Buckley, 271 U.S. 323, Truax v. Corrigan, 257 U.S. 254; Civil Rights Cases, 109 U.S. 3; Ex Parte Virginia, 100 U.S. 339; Virginia v. Rives, 100 U.S. 313; and United States v. Cruikshank, 92 U.S. 542.

26. Townsend v. Shank, 404 U.S. 282; Graham v. Richardson, 403 U.S. 365; and Shapiro v. Thompson, 394 U.S. 618. Indeed, the equal protection clause can not be used as a bludgeon to compel a state to violate any provision of the Constitution. Sloan v. Lemon, 413 U.S. 825.

27. 98 F. Supp. 529, and 103 F. Supp. 920.

28. 132 F. Supp. 776,777.

29. Keyes v. School District No. 1, (1973) 413 U.S. 189, 205; Washington v. Davis, (1976) 426 U.S. 229, 240; Dayton Board of Education v. Brinkman, (1977) 433 U.S. 406, 413.

30. 42 U.S.C. Sections 2000a - 2000h-6.

31. Congressional Record, Vol. 110, Part 10, pp. 12,713-12,717. Although the provisions of Title IV of the Civil Rights Act of 1964 were in rapport with the true meaning and real objective of the equal protection clause, I voted against the Act for reasons stated by me in detail while the legislation was under Senate consideration. Some of these reasons had their origin in provisions of the Act, and others were prompted by apprehensions as to how it would be applied by courts and executive agencies.

While many of them are not germane to my specific subject, I deem it not altogether amiss to epitomize some of them in this note.

The Act is in irreconcilable conflict with the principle that all Americans of all races are entitled to equal rights under both federal and state laws. It deprives all Americans of precious rights for the supposed benefit of members of minority races, and it subordinates other precious rights of all Americans to demands made by or in the name of members of minority races.

To be sure, the Act pays some lip service to the concept of equality. In so doing, however, it is reminiscent of Anatole France's assertion: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

The Act was devised with the understanding that in its practical administration it would be employed to extend to members of minority races special privileges not accorded to others. It is being so administered.

The Act violates with vengance the doctrine of the separation of powers, which wisely discountenances the merger of powers to make, enforce, and interpret laws in a single public official or single public body.

It does this by combining in the federal agencies charged with its administration and enforcement these discordant powers: (1) The legislative power to write regulations having the force of law; (2) the executive power to administer and enforce its provisions and these regulations, and to prosecute violations of them; and (3) the judicial power to judge and punish these violations.

The combination of these discordant powers in the federal agencies make them, in reality, judges in their own causes. As a consequence, they cannot act with the cold neutrality of the impartial judge, and those subjected to their jurisdiction are denied due process and fair play.

These provisions of the Civil Rights Act of 1964 are repugnant to my philosophy of government and my enduring conviction that freedom is the most precious value of civilization.

Apart from other considerations, they determined me to vote against the Act. There were other considerations. But they strongly reinforced my determination.

I had grave apprehensions as to how HEW, EEOC, and other federal executive agencies would interpret and apply the Act, and as to how the Supreme Court would react to the effort of its Title IV to put restraints on judicial and bureaucratic abuse of the equal protection clause in the assignment of students to state schools.

Another consideration arose out of my realization that the enactment of the Civil Rights Act was another step in the process by which the power-hungry federal government was undertaking to destroy the states as viable instruments of government and concentrate in itself the power to dominate the lives of Americans in virtually all respects.

This consideration has long been of profound concern to me. It ought to be of similar concern to every American who does not relish the prospect of having his status reduced to that of a galley-slave pulling an oar in the ship of state.

My gravest apprehensions have materialized since the passage of the Act. HEW, EEOC, and other federal executive agencies have stretched the drastic provisions of the Act far beyond the intent of Congress, and converted what it intended to be a prohibition of racial discrimination into a mandate for racial integration.

By so doing, HEW, EEOC, and other federal executive agencies have arrogated to themselves dictatorial powers, and are exercising them daily throughout our nation to impose their notions on states, subdivisions of states, educational institutions, industries, labor organizations, and individuals.

32. 391 U.S. 430, p. 433, footnote 2. The Green Case is analyzed with candor, courage, and correctness by Lino A. Graglia in his Disaster By Decree, The Supreme Court Decisions On Race And The Schools (Chapter 5), which was published by the Cornell University Press and merits reading by all Americans who abhor judicial tyranny.

33. Alexander v. Holmes County Board of Education, (1969) 396 U.S. 19. See, especially, headnote 1 of the report of this case in 24 L.Ed.2d, pp.19, 20.

34. Lino A. Graglia: Disaster By Decree, Chapters 1-6, pp. 1-103.

35. Swann v. Charlotte-Mecklenburg Board of Education, (1965) 243 F.Supp. 667, affirmed 369 F.ed 29 (1966).

36. Monroe v. Board of Commissioners, (1968) 391 U.S. 450, which adjudged a "free transfer" plan to be invalidated by the equal protection clause, reinforces the holding of the Green Case that the desegregation of public schools demands that school children be robbed of their freedom, and demonstrates the falsity of any claim that federal courts which enter desegregation orders are not applying the clause to individuals in violation of its express declaration. In it, the Court declares: "We do not hold that 'free transfer' has no place in a desegregation plan. But like 'freedom of choice', if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable." By these words, the Court makes a mockery of "freedom." No human being has any "freedom" if he has to exercise it according to the dictates of government.

37. Swann v. Charlotte-Mecklenburg Board of Education, (1970)431 F.2d. 138, 147.

38. Judge McMillan's ruling in the Swann Case is reported in 311 F.Supp. 265 (1970), and the ruling of the Circuit Court vacating it in 431 F.2d 138 (1970).

39. Lino A. Graglia: Disaster By Decree, Chapter 5, p. 59.

40. In enacting Title IV of the Civil Rights Act, Congress was exercising its constitutional power to regulate de jure segregation in state schools. It was not usurping the power to regulate de facto integration in them. These assertions, I maintain, are established by both the language and legislative history of the Title. As a member of the Senate, I spent virtually every minute in that body while it was considering Title IV and heard virtually every word spoken by any Senator concerning it. By so doing, I acquired knowledge of the Act's legislative history first hand. After the Supreme Court granted certiorari to review the Swann Case, I joined Senator Ernest F. Hollings, of South Carolina, and Representative Charles R. Jonas, of North Carolina, in filing with it as amici curiae a brief in behalf of the Charlotte-Mecklenburg Classroom Teachers. As uncompensated attorneys for them, we insisted that the exclusion of students from their neighborhood schools and their forced busing for integration violated the equal protection clause. In preparing the brief I made a meticulous study of the legislative history of Title IV. I was shocked by the Supreme Court's use of the de facto argument to invalidate a valid act of Congress, and made a second meticulous study of the legislative history of Title IV to determine whether the Supreme Court's insupportable argument had any basis whatever.

41. By ignoring Title IV of the Act in the Green Case and nullifying it in the Swann Case, the Supreme Court exhibited its determination to impose the personal notions of its members in respect to matters having racial implications

upon the people of our country, anything in the Constitution and laws of the United States to the contrary notwithstanding.

This is undoubtedly a drastic assertion. Its truthfulness is fully corroborated, however, by these additional decisions of the Supreme Court:

a. South Carolina v. Katzenbach, (1966) 383 U.S. 301.

b. Katzenbach v. Morgan, (1966) 384 U.S. 641.

c. Jones v. Alfred H. Mayer Co., (1968) 292 U.S. 409; Sullivan v. Little Hunting Park, Inc., (1969) 396 U.S. 229; District of Columbia v. Carter, (1973) 409 U.S. 418 (dicta); and Tillman v. Wheaton-Haven Recreation Association, (1973) 410 U.S. 431.

d. Johnson v. Railway Express Agency, (1975) 421 U.S. 454; Runyon v. McCrary, (1976) 427 U.S. 160; McDonald v. Santa Fe Trail Transportation Company, (1976) 427 U.S. 160.

e. United States Steel Workers of America v. Weber, (1979) 443 U.S. 193.

These decisions have been hailed in some quarters as enlightened judicial achievements. It would be more consonant with truth to call them amazing judicial performances. In each of them the Supreme Court committed linguistic mayhem or judicial verbicide on words of the Constitution, or words of an Act of Congress, or on words of both to reach their amazing rulings.

The explanation of these rulings is to be found in a story which may be apocryphal. Representative Timothy J. Campbell, who had been sent to the House by Tammany, sought to persuade President Grover Cleveland to sign into law a pet bill which he had induced Congress to pass. The President demurred on the ground the bill was unconstitutional. Congressman Campbell responded to the President's objection with this rhetorical question: "What's the Constitution between friends?"

When all is said, the Supreme Court did constitutional evil in these rulings to achieve ends it deemed beneficial to blacks and the country. These decisions were not concerned with the assignment of students to state schools. For this reason, I hold my comments on them to a minimum.

To understand the drastic impact of two of them, South Carolina v. Katzenbach, and Katzenbach v. Morgan, upon constitutional government in America, it is necessary to understand what the Constitution decrees concerning the power to prescribe qualifications for voting.

The power to prescribe qualifications for voting for state officers is reserved to the state by the Tenth Amendment. The power to prescribe qualifications for voting for federal officers is conferred upon the state and denied to Congress by these provisions of the Constitution: Article I, Section II, Clause 1; Article II, Section I, Clause 2; and the Seventeenth Amendment.

The constitutionality of the highly praised, but completely devious, Voting Rights Act of 1965 was upheld in South Carolina v. Katzenbach. In reaching this astonishing decision, the Supreme Court was compelled to make and did make these rulings.

a. That the absolute prohibition of congressional bills of attainder embodied in Article I, Section IX, Clause 3, and the due process clause of the Fifth Amendment afford no protection to a state, or its officers, or its citizens in their corporate or collective capacity.

b. That the power of Congress to enforce by appropriate legislation the Fifteenth Amendment's prohibition of racial discrimination in voting confers upon that body the autocratic authority to suspend for at least 5 years the constitutionally guaranteed powers of politically selected Southern States to prescribe qualifications for voting for both state and federal officers.

c. That the constitutional doctrine of the equality of the states is a worthless shibboleth which is effective only at the precise moment of a State's admission to the Union, and does not prevent Congress from robbing a state thereafter of constitutional powers other states exercise and thus reducing it to the status of an inferior state.

d. That Article III, Section II, Clause 2, empowers Congress to close to the politically selected Southern States condemned by the bill of attainder violative of due process all federal courts in the land except the United States District Court for the District of Columbia, and to vest in that far-away court exclusive jurisdiction of all cases in which the condemned states seek relief from the autocratic provisions of the Act.

South Carolina v. Katzenbach is irreconcilable with United States v. Lovett, (1946) 328 U.S. 303, and Ex Parte Milligan, (1866) 4 Wall. (U.S.) 2, 120-121.

The Lovett Case rightly invalidated a congressional bill of attainder applying to federal executive officers suspected of subversive leanings. The Milligan Case rightly ruled that the Constitution is an unalterable law for rulers and people alike at all times and under all circumstances, and that no notion involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can ever be suspended.

Consistency may be either a jewel or the hobgoblin of little minds and fools. But it is neither to Supreme Court Justices.

The Supreme Court adjudged in Katzenbach v. Morgan that the power vested in Congress by Section 5 of the Fourteenth Amendment to enforce the equal protection clause by appropriate legislation confers on Congress the contradictory power to nullify the equal protection clause. In that case, the Supreme Court made a ruling irreconcilable with the provisions of the Constitution governing the power to prescribe qualifications for voting, and its own sound interpretation of equal protection clause in Lassiter v. Board of Education of Northampton County, (1959) 360 U.S. 35. It declared that Section 5 of the Fourteenth Amendment empowered Congress to do these things:

a. To nullify a New York law which established a qualification for voting, namely, literacy in the English language, which was in harmony with the equal protection clause.

b. To substitute for the nullified New York law a federal qualification for voting, which Congress was forbidden to establish by all of the provisions of the Constitution governing the power to prescribe qualifications for voting.

The opinion which undertakes to rationalize this linguistic mayhem or judicial verbicide is intriguing, despite the disconsolation it gives to those who, like Chief Justice Marshall, believe the Supreme Court ought to interpret the Constitution to mean what it says.

It is simply this: When Congress exercises its power to legislate under Section 5 of the Fourteenth Amendment, the Supreme Court cannot inquire whether the congressional legislation offends the equal protection clause. It is limited to determining whether the legislation is calculated to prevent the state from violating the equal protection clause in the future.

Americans who cherish local government ought to pray that Congress will not carry the illogical ruling in Katzenbach v. Morgan to its logical conclusion. If it did, Congress would provent all future violations of the equal protection clause by enacting legislation denying states the power to make, enforce, and interpret laws.

The Supreme Court ruled in United States Steel Workers v. Weber that an employer in an industry covered by Title VII of the Civil Rights Act of 1964 is authorized by it to discriminate in favor of black employees and against more senior white employees, notwithstanding Title VII expressly forbids all racial discrimination in all industries covered by the Title.

Jones v. Alfred H. Mayer Company may be described as the bellwether of the decisions cited in subdivisions 3 and 4. It was decided in 1968, and the other decisions merely follow its indefensible lead.

Undoubtedly the decision in the Mayer Case and the decisions which follow it have committed the most monstrous linguistic mayhem or judicial verbicide on the Constitution and Acts of Congress in the annals of America.

By these forbidden processes, the Supreme Court Justices have arrogated to Congress and themselves virtually unlimited power to punish every individual who refuses to make a contract with or to sell property to another individual anywhere in America if his refusal is motivated by racial discrimination or racial preference. In so doing, they reflect their purpose to eradicate by constitutional and legal perversions racial prejudice and racial preferences from the minds and hearts of Americans.

To confer their newly invented power on Congress and themselves, the Justices revamp the history and objectives of the Thirteenth Amendment and the Civil Rights Act of 1866 (42 U.S.C. Sections 1981, 1982); place upon that Amendment and that Act constructions totally repugnant to every word in them; and repudiate sound Supreme Court decisions of the past which span a period of 100 years and demonstrate the invalidity of the new construction.

It is worthy of note that some of the litigants argued for the same distorted construction of the Constitution in the Civil Rights Cases of 1883. The Supreme Court wisely rejected their argument by observing that these litigants were "running the slavery argument into the ground."

The Supreme Court further declared in those cases: "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected." (109 U.S. 3, 27 L.Ed. 835, 844.)

One of America's most profound constitutional scholars, Charles Fairman, makes some cogent comments on the Mayer Case in his illuminating book "Reconstruction And Reunion 1864-88, Part I." This book is Volume VI of the History of the Supreme Court of the United States, which is being financed by the Oliver Wendell Holmes Devise.

Fairman states that in the Mayer Case, the Supreme Court "appears to have had no feeling for the truth of history" and "allowed itself to believe impossible things." (p. 1258)

Senator **East**. Our next witness is the Honorable James B. McMillan, Judge of the U.S. district court, Charlotte, N.C.

Judge McMillan, we welcome you this morning and appreciate your taking the time from your demanding schedule to come up here to be with us and to share your thoughts generally on this subject of busing and of course, perhaps if you so choose, on the merits or demerits of S. 1647. We welcome you and happily receive your testimony.

STATEMENT OF HON. JAMES B. McMILLAN, JUDGE, U.S. DISTRICT COURT, CHARLOTTE, N.C.

Judge **McMillan**. Thank you, Mr. Chairman.

I was a trial lawyer for 23 years, and I used to make a lot of speeches. Since I became a judge 13 years ago, I have had to listen to other people make speeches; and I did not really come to make a speech.

I also would like for the record to record that I did not come voluntarily; I came in response to an invitation and did not come until I was promised my expenses would be paid, because I did not want to seem a volunteer on a proposition of this sort.

We tend to deal on an emotional level with a problem which constitutionally is essentially a question of fact. I grew up, as did Senator Ervin and Senator Helms, accepting the segregated life which was the way of America for its first 300 years.

Segregation was not invented by North Carolina. We had it thoroughly when I was growing up on a farm. The black people and the white people were good friends, but they had a separate existence. I had never seriously challenged that question, even intellectually, until much later in my life.

When I was president of the State bar association about 20 years ago, I went to Chapel Hill and made a speech to the Law Review Association. In the course of that speech, I made some remarks to the effect that I hoped that we would be forever saved from the folly of transporting children from one school to another for the purpose of maintaining of a racial balance of students in each school.

Well, that expressed my feelings. Five years later I got in the position where I had to act on something that was based on fact and law rather than feelings.

Senator Ervin, for whom I have tremendous admiration and respect and who in effect appointed me to my present job, had essentially the same views then that I did then. I have had to spend some thousands of hours studying the subject since then and have been brought by pressure of information to a different conclusion.

The information is not my view of one side of a disputed set of facts. The information, which is recited in detail in outline form in the paper which I have filed, comes from uncontradicted testimony of public officials. Almost none of it comes from testimony of people who were seeking to bring about some changes in the order of school segregation in North Carolina.

I have never felt and do not feel now that the order that was entered in Charlotte is one that ought to control the destiny of the Nation, because every school problem, like all other problems that come into court, has to be dealt with on its facts, not on the basis of some national average or national like or dislike, but on the basis of the facts of the case and the rights of the parties under the law of the land.

That is how I get here.

In this paper which I have filed, I ask to be considered not as an advocate but as a reporter who, after thousands of hours of evidence, study, and observation, has recorded a lot of information and has been led to some conclusions.

The value of what I say depends not on any weight of oratory but on the weight, if any, of the facts presented, and not upon my personal opinion.

As I said, I am a native North Carolinian. I have had ancestors in all the wars since before the Revolutionary War. One of my ancestors named John Grady happened, through lack of wisdom, to be the only Whig killed at the Battle of Moore's Creek Bridge in 1775. Like all the rest of you, I have taken part in the wars that America has fought. I have supported them all. I had two grandfathers who fought on the "right" side of the Civil War. So I do not come here as anybody with anything but the traditional early life view of this problem.

My understanding of the Charlotte case was reluctant. I first said, "What's wrong in Charlotte?" And the plaintiff's lawyers kept saying, "We need to have pupil assignments changed." I set the case for hearing reluctantly. I heard it reluctantly, at first unbelievingly.

After the facts began to be assembled and I began to deal in terms of facts and information instead of in terms of my natural-born raising, I began to realize and finally advised the parties that something should be done.

The school board, with an attitude which I suppose is about what any school board would have taken under the circumstances, took the view that they would not make any changes. After a year and a half of invitations to make changes, I employed a consultant and had him prepare a plan for desegregation of the Charlotte schools.

The plan was modified to the better by the school staff. Persons who had never been named to me proposed that we include the whole county instead of just the metropolitan area, which had been my original purpose. I accepted their amendment, knowing that it was bad politics but good law and good school administration.

So the fact-finding went on, and in the course of 2 or 3 years of additional fact-finding which followed the preliminary order I learned a lot—a lot that I still did not fully know at the time of the original order. What I am about to say now, which is really the topic sentence of a number of different propositions, is what I learned.

First, Charlotte—and I suspect that is true of most cities—is segregated by Government action. It is listed on page 7 among other places in this paper. It is segregated by zoning; by the location of institutions; by the restrictions which deeds have on what kind and color of people can live in places and what they have to pay for a house in order to live there; by the location of abattoirs and hospitals, which never are located in the same place; by urban renewal, which was a crusade that failed—it was urban destruction—in which most of my observation—and I have heard a lot of urban renewal cases—shows a displaced renter was given sometimes enough to move his personal property but was then handed a list of real estate agents and told, "Go find yourself a place to live."

These actions by Government displaced thousands of people, and it was predicted that they would move into cheap country, and they did. It was predicted that whites would move out into the more expensive suburbs, and they did. Freedom of transfer exaggerated the process of segregation.

The overall effect of closing schools and reassigning pupils, giving of freedom of choice, was to perpetuate and increase the segregation which already existed. It was not because of residential selection; it was because of necessity that black people went to poor places and white people went to protected suburbs.

Attached to this paper are 17 fine-print pages of excerpts from the statutes and the constitution of North Carolina under which life in North Carolina, starting shortly after *Plessy* v. *Ferguson,* was segregated from the cradle to the grave. Cemeteries, hospitals, schools—everything—were segregated.

The effect of the decision of the Supreme Court in *Plessy* v. *Ferguson* 85 years ago was to resegregate an America which had some possibility then of establishing a more or less open society.

We were not unique in North Carolina. *Plessy* v. *Ferguson* stopped the music in almost every other place. The worst race riots in this century were in Detroit about 15 years ago and in Chicago just after World War I.

The wildest display of animosity and hatred toward blacks which I have heard since I was a child was 2 years ago in an outdoor sidewalk cafe in the shadow of Faneuil Hall in Boston. The speaker, to whom I chose not to identify myself, was the principal of a Boston school.

The northern urban areas are more tight-knit segregated now than many places if not most places around the southern areas.

The second proposition is that segregation has left black students with an impaired capacity. There is not time to go into this, but before *Swann* was ever heard of there was a gap of two to five grades or so in the capability of black students and white students of the same age.

Segregation itself had concomitant problems, which are outlined, again, in this paper. Some of those problems are that the black schools just did not get the resources—the libraries, facilities for labs, and athletic facilities.

Although the black teachers had more graduate degrees than the white teachers, the black schools had all-black faculties and the white students had all-white faculties, except for a few token faculties, in 1968.

"Until unlawful segregation is eliminated," I said in 1969, "it is idle to speculate whether some of the gap can be charged to racial differences or to socioeconomic cultural lag. Of all the factors affecting educational attainment, segregation appears to be the factor under the control of the State, which still constitutes the greatest single barrier to adequate educational accomplishment."

I think you chase a red herring when you talk about the Coleman report. In 1970 I wrote something on that subject which I will repeat: "The duty to desegregate schools does not depend upon the Coleman report nor on any particular racial proportion of students. The essence of the *Brown* decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and experience, and that segregated education itself is inherently unequal. The tests which show the poor performance of segregated children are evidence showing one result of segregation. Segregation, however, would not become lawful if all children scored equally on all tests."

In other words, we cannot make blacks go to the rear of the bus just because the back seat is just as close to the exit as the front seat. [Applause.]

Senator **East**. I would like to remind the audience, whatever side of this issue that they are on, that we are not to have that kind of conduct if we are to have an orderly hearing. I respectfully request that you desist from doing that in the future. If not, we will ask the officers to remove you from the hearing room.

Judge, would you continue, please?

Judge **McMillan**. Thank you, Senator.

The fourth part of this paper says that busing is necessary, legal, cheap, safe, and practical. These facts are laid out in the various orders that are on file.

At the time of the original *Swann* order the cost of the transportation, which was not then being incurred, which was added by the busing order, was approximately the amount of 2 days of operation of the schools. It was approximately 1 percent of the cost of operating the schools for a year. Those ratios between costs of per-pupil transportation as opposed to the previous costs have not substantially changed in the last 12 years.

Three-fifths or more of the public school students in North Carolina ride school buses every day. Seventy percent of those are of tender years—aged 1 through 8. Before *Swann,* the longest trip that children took on school buses in Mecklenberg County were 39 miles each way for 4- and 5-year-old kindergarten children.

So the problem of people getting up early in the morning to go to school was not invented by me, was not invented by the courts which upheld use of the available remedies to cope with segregation; it was there already.

The bus was the vehicle by which schools were originally segregated. This was true in the little community where I grew up. It is true of many similar communities. If you had not had the school bus, the segregated school system could not have been built.

One very interesting piece of information on this: I cite—and I do not remember which section it is—in the paper that in the late sixties and early seventies there were six, I believe, new high schools and one new junior high school built in Mecklenburg County. They had among them the capacity for something like 12,500 students.

The number of students who lived close enough to be required to walk to school was about 74. So those schools were built where there were no children. All the children had to be brought in by somebody. The State brought those who lived more than a mile and a half away.

At that same time schools were built—and this has to do again with the location of schools—and enlarged where they would serve the black centers of population. So when the case came into court, there was no possible way to eliminate the segregation of the children except to use the method by which 60 percent of the children in the State were already getting to school.

These are the realities which are set out in considerable detail in this paper.

White flight was suggested. I read in the "World Almanac" that in 1971, going to private schools in the United States, there were 5,100,000 children. In 1980 there are attending private schools in the United States some 5,100,000 children.

I have no quarrel with the people who go to private schools. The problem presented constitutionally is whether the education being received at the public hand is education which is or is not constitutionally appropriate.

"Forced busing to achieve racial balance," that is language I do not recognize. The order on desegregating Charlotte expressly contemplated variations in the population of the schools as 3 percent at Bain Elementary to 41 percent at Cornelius. The 1981 ranges are from 15 percent black to 57 percent black, except for one school which has 92 percent black. This, as I said at that time—on page 21—is not racial balance but racial diversity.

The other thing pertinent to North Carolina is that in the year before the *Swann* case came to a head discrimination against city children was eliminated; and city children, of whom there are many, became for the first time entitled to bus transportation.

I comment that freedom of choice has been a tool of segregation, not of constitutional equality; that the use of busing, of construction, location, and size of schools, the location of mobile classroom units, the closing of schools, and the reassignment of pupils, have been tools of segregation and discrimination, not of equal opportunity.

There is too much of this, but you cannot come to a different conclusion when reading the facts which are set out in this paper.

I come now to the suburban schools. The actual figures were: Total student population, 12,184; they only had 96 students out of 12,184 who were within walking distance of those schools when they were opened.

The last one that I remember receiving a report on—I received a report that 1,345 out of 1,345 enrollees rode a bus on October 14, 1971.

Magnet schools—the only magnet school Charlotte had on the board in 1968 was abandoned as soon as the segregation order was entered, because it was located in the perfect position for a big high school that is what was proposed—the perfect position through which desegregation of the high schools could be accomplished readily.

The bus is the safest way to get to school. My friend, Jesse Helms, did not remind you, but of all the accidents reported in that particular period of time, none was fatal; and the statistics of all facts are that the bus, in addition to transporting 15 to 30 times as many people as the car, is also the safest way—safer than walking even—to get to school.

It costs a little, but nothing to compare with the cost of lowering the quality of the education and experience which is available to the students.

The staggered hours—schools opening all hours—you cannot operate a school system where buses transport to three levels of school without having staggered hours. The hours in 1969 varied from 8 o'clock to 8:45 and in the afternoon from 1:30 to 3:10. Those are facts of life, not something caused by buses.

Neighborhoods—I guess I will summarize this by saying simply we do not have neighborhood schools for most of our children; we do for most children some of the time we hope; but if a first-grader lives so far away that he has to ride a bus—and most first-graders do ride buses to school—that school is not a part of his neighborhood.

I would like to repeat that not all school cases are alike. Each one has to be dealt with on its own merits. We need to be reminded also, as I did remind myself in 1969, that the issue is one of constitutional law, not politics; and constitutional rights should not be swept away by temporary majorities.

As to how Charlotte and Mecklenburg are doing today, about two-thirds of the children ride school buses. Somewhere around 11,000 or 12,000 of these are considered as being transported to maintain desegregation.

The superintendent reports that disruptions are a thing of the past. There has been little change in the last 5 years in the number of students attending nonpublic schools. The school system is using all of the available methods—the whole catalogue of pairings, groupings, satellites, gerrymandering, mobile units, opening and closing schools, and busing.

If you take the bus out, students will either go to a crowded, segregated school or not be able to get there except under their own steam.

The accomplishment of students for the first time in many ways is better than the national average. The information is in here. The performance of the Mecklenburg students has been going up for the last 4 or 5 years; whereas nationally, we are told, performance is going down.

This is a very hasty review of the facts, to which I call the attention of the Senate, upon which in one location busing was ordered as a matter of constitutional right. The facts asserted in the proposed legislation are not supported by the evidence I have heard for hundreds of hours and the study I have conducted for thousands of hours.

I have no readymade legal opinion on the constitutionality of the proposed legislation. I suppose I have really been addressing myself to a case history of the necessity and fairness of one use of transportation to bring about constitutional equality.

We face, I guess, the question: What do we hope for America? A land divided, race versus race? Or do we face the land contemplated by the 14th amendment?

I think we need to raise our eyes from this little corner of the map called "busing" and look at the whole spectrum of just where we are, what we are running the country for, and whether we really want to go back to a segregated America.

In 1895 we had an unfortunate decision of the highest court, and it resulted in a substantial resegregation of areas where segregation was about to come to an end or where progress was being made. It sounds to me as though we face another one of those milestones.

I read on the wall of a restroom in a college town one time a little piece of graffiti which said, "In mankind's journey through time, now and then he stumbles upon the truth; but never mind, he gets up and dusts himself off and goes on as though nothing had happened."

My real apprehension here is this: Although we stumbled upon the truth in the fifties when we went back to applying the 14th amendment's equal opportunity to the people who had been deprived of it, I hope we are not now dusting ourselves off and proceeding as though *Brown* had never happened and as though the Government had segregated its citizens can now shrug its shoulders, State and national, to the constitutional rights of those citizens.

I do not remember uttering any light word in the last 15 to 20 minutes or however long I have talked—and I apologize for taking up so much time—but when I was a kid we lived about 500 yards from the swimming hole. It was muddy; and we had to fight with the snakes, frogs, and turtles to get in.

There was a black family who lived about 100 yards from the swimming hole, and there was an Indian family who lived about 500 yards away. We used to meet there and swim. We would be getting our clothes off as we ran to the swimming hole.

Somewhere along in that time I learned a little ditty which I think might apply; I hope it does not. You are all familiar with it. The little ditty says, "Mother, may I go out to swim? Yes, my darling daughter. Hang your clothes on a hickory limb, but don't go near the water."

I suspect if you take the bus out of the schools you will have people who can hang their clothes on a hickory limb but they are going to have a lot of trouble getting near the water.

Thank you.

Senator EAST. Thank you, Judge.

I would like to welcome, joining our panel this morning, our distinguished colleague, Senator Heflin from Alabama. We are delighted to have him here with us.

Senator, we have heard from Senators Roth and Helms, and Judge McMillan is here to give us his testimony. You are familiar with the balance of our panels here this morning. We are trying to move along as swiftly as we can.

I do not know if you have an opening comment you would like to make?

Senator HEFLIN. No, thank you.

Senator EAST. Thank you.

We will then proceed with questioning here. All of us will try in some way to impose some restraint, lest we eat up each other's time too much and also consume the time of the later panelist. We might even conceivably be interrupted by a roll call or two; let us hope not.

Judge, as chairman of the panel I would like to thank you for coming and sharing your excellent insights with us.

I find frustrating in hearings of this kind—and I am sure you do too as a participant—that the time is so limited that we cannot really explore the many facets of this sort of thing in detail in terms of the educational impact, the community impact, and in terms of the constitutional questions. Simply stating the obvious, we all work under a great frustration here as we take a lick at it, at least in this format. We can study it more reflectively in our own offices.

So appreciating those great time restrictions that we have, I will make my comments and questions to you brief; but I do not wish to imply or suggest—and I am sure you feel the same way—that I have exhausted the subject in terms of the many points that you and others might raise.

Judge, the trouble that I have with busing by the lower Federal courts as it has evolved over the past decade or more—well, I have several nagging doubts about it.

First of all, I find it unfortunate—and I am not necessarily saying you are saying that—that there is a tendency in the civil rights movement today to look upon one's embracing of forced busing as the litmus test of a genuine commitment to racial neutrality and equality under our Constitution.

I realize we each have our own convictions on it, and I am not suggesting I can resolve it to everybody's satisfaction. Even Solomon in all of his wisdom could not do that. But I would strenuously argue that there are a tremendous number of people in this country—and again I do not pretend to speak for them—black and white, who simply would not accept the idea that this is the touchstone of a sound, effective, fair civil rights policy.

In regard to forced busing, although its practitioners and promoters are well-intentioned and honorable people, there are a vast number of people in this country who simply do not look on it as the litmus test of a sound civil rights policy.

In fact, they would contend it is contrary to it, because under *Brown* v. *The Board* and under what I think many Americans perceive to be the constitutional standard today we have a colorblind Constitution; and we do not make classifications and distinctions based upon race by Government under the equal protection clause of the 14th amendment at the State and local levels. That supposedly was the point of *Brown*. Certainly that was the point made in the 1964 Civil Rights Act which Congress passed.

The courts, the Department of Education, and others on their own initiative developed this idea that some way or other you had to have racial balances and proportions in order to achieve their definition of constitutional equality.

Again, I respect their position; but they have spawned an enormous national debate as to whether this remedy and that definition of the constitutional right is an appropriate one.

We can all say the equal protection clause requires this or requires that. Of course the purpose of the whole democratic process is ultimately to determine what that is and at what point we draw the line in terms of how we define the right and remedies that are appropriate to the achievement of the right. Hence that is the nub of our problem.

Again, I am not pretending I can resolve it to everybody's satisfaction; but I am first making the point—and I think it is a valid point—in a democratic society where fundamental policy decisions are to be made it occurs to me they will have to be made ultimately in the legislative chamber.

As a matter of fundamental democratic political theory and as a fundamental problem of policy in this country, those defending judicial policymaking take a position—with all due respect to it—that is contrary to a very broad segment of opinion.

Those of us in the political arena and the legislative arena work, live, and move in a different realm and have to grapple with it. We do not have the luxury of simply cloistering ourselves in the office of the judge or the office of the bureaucrat and looking at this purely as a matter of statistics, as you say, or fact, or quantity.

It is a very fundamental problem ultimately of democratic political theory. It takes on a qualitative dimension here.

In a democratic society, what is the point beyond which you can force people to do something that by their own judgment is uncalled for, unwarranted, indefensible, and has nothing to do with what they feel is an honorable, fair, and legitimate understanding of the Constitution?

There have got to be limits to how far one can go in a democratic society in imposing a solution that publicly is very distasteful.

I would like to put that question to you as a member of a legislative chamber who must live, work, and have his being in that world. What would be your thought on that? What are the limits of judicial power in forcing the citizenry in such a dramatic way to do something to which there is such strong and abiding opposition?

The problem is that you are not unique to Charlotte. You see, under our bill Charlotte could do what they wanted to. We have no objection to Charlotte doing what they want to do. But we are finding in this committee—because the U.S. Senate represents the entire Nation—we are getting people from Seattle, from Los Angeles, from St. Louis, and thither and yon, and they are negative on busing. Their people are negative on busing. They want some sort of relief. They want to be able to achieve what they think is a more reasonable, commonsense, practical solution. Quite candidly, they are being responsive to policy sentiments in their area.

That is very consistent with the democratic political theory. It is inescapable. We do not live in an authoritarian system where you can continue to expect people to obey excessively coercive and unjustified orders simply because they are handed down by Federal judges or particularly selected bureaucratic officials.

I am simply raising this question then. What are the limits that you see here? What is the role of the legislative body? The testimony opposing S. 1647 suggests there is no role for the legislative body except to say, "Well, the judges say that's what the Constitution is; and we have no way of responding to them." Where are we?

How would you as a Federal judge evaluate our position as a matter of separation of powers—which this subcommittee deals with? How would you as a Federal judge view our responsibility and position as members of the legislative chamber?

Obviously, I think you distinguished gentlemen, the judiciary, have run a good point into the ground. I think you have gone too far. I think you have lost touch. And you have left us holding the bag; or, mixing my metaphors horribly here, we are down in the ditch; we are trying to get out. We are trying to find some way of restoring a little prudence; common sense; and, frankly, a little sense of public control of the destiny of our local schools.

I do not find that a particularly outlandish thing to want to do. I think it cuts across partisan lines; I think it cuts across racial lines; I think it cuts across liberal-conservative lines; I think it is the commonsense of a democratic society.

We have been pulled into it. I am sure all of us would just as soon be doing something else this morning than grappling with this problem of how we cut through this Gordian knot; and it is a Gordian knot of the first magnitude.

I would be interested in your brief reflections on that, and then I will let my distinguished colleagues proceed.

Judge McMILLAN. First, if you have been informed that being a Federal judge—the only one in reach—in a community of half a million is a cloistered existence, I would like to advise you to the contrary.

Senator EAST. But you see, it is a lifetime appointment, and it is not necessary to go out and ultimately be accountable in the political arena. That is the fundamental problem that people in the legislative branches face—that there must be some degree of responsiveness to public sentiment on that, or willingness at least to get out and to grapple with it.

Judge McMILLAN. I am looking for the answer that I gave 12 or 13 years ago to that particular question, because I considered it a relevant question. The gist of what I said then and what I say now is that in a democracy the majority ultimately will have its way. Our slave-owning grandfathers discovered this 115 years ago. We discover it frequently when constitutional amendments are made.

In the law of today, which I believe to be sound, one of the methods necessary to deal with the constitutional deprivation of the schools is transportation. It is the way we got segregated. We cannot, without building scores of millions of dollars worth of schools in North Carolina, operate the schools without buses.

I also said and still say that the majority, by the amendments provided in the Constitution—the methods of amending the Constitution—can have their way. But the question we have is what to do under the law as it is until by lawful means there is a change.

I have not studied the question of whether Congress has the power to pass such a law restricting the jurisdiction of courts in the use of a remedy where such restriction diminishes a constitutional right. That is a legal question I think I stated, or maybe it was stated in your original memorandum, and naturally it is in part a philosophical question. What I have been doing is operate within the framework of the law as it is.

I would question whether it is constitutional to take away a remedy which does in fact take away a constitutional right. That again is a question, it is not a legal opinion; but I think it touches the problem that affects the constitutionality of what is being proposed here.

Senator EAST. For the sake of time, Judge, I will let Senator Baucus proceed with his line of questioning.

Senator BAUCUS. Thank you, Mr. Chairman. I do not want to preclude you from asking any more questions.

Senator EAST. That is all right. Because of the time element I think we had better press on. I can always come back.

Senator BAUCUS. Judge McMillan, I want to thank you very, very much for coming. I know you have come a great distance, and I know how busy your schedule is. I appreciate your responding to our invitation to come and testify.

The point is sometimes made by some people that Federal judges live in an ivory tower; they are out of touch. These ivory-tower judges are accused of coercing students to be bused against their will, and of coercing communities to undertake an endeavor which is destructive and lacks commonsense.

So many of these Federal judges are simultaneously characterized as conservative and tend to be Republican more often than Democratic. Given their background, why, in your view, is it that they have nevertheless decided that in certain cases busing is the only available remedy to vindicate minority groups' constitutional rights, particularly under the 14th amendment?

Judge MCMILLAN. I think the answer is obvious. Every Federal judge makes an oath to support the Constitution of the United States and laws enacted pursuant to that Constitution. The judges have had to study the facts. They have had to learn what the problem was they were dealing with.

I had 5 or 6 weeks of evidence presented to me on this question, and over a period of 2 or 3 years I must have spent a year of work on it in one way or another. Over a 5-year period I probably spent 15 or 20 percent of my time on it.

The judges who have these cases do what the jury has to do in a murder case and what the judge has to do in any kind of case—learn what the score is about his particular local set of facts and try to do right about it. That is the only answer I can give you.

I started out right where Senator Helms is. I thought this was just too much trouble.

Senator BAUCUS. He used the word "folly" earlier.

Judge MCMILLAN. He called it "folly." Yes, I called it "folly" 15 years ago, but I did not know.

Senator BAUCUS. But after further study and after spending hundreds of hours and in some cases thousands of hours on it, you have come to a different conclusion?

Judge MCMILLAN. Yes.

Senator BAUCUS. That is, in some cases, reluctantly, at least in Charlotte-Mecklenburg, it was required?

Judge MCMILLAN. Yes.

Somebody wrote me a letter a few weeks ago cussing me out because I did not agree with what my friend Senator Ervin had to say on this subject. I wrote him back, and I said:

> I love and respect Senator Ervin. I had his views 20 years ago. I have had to learn something about it, and I have changed mine. He has not changed his, and we are not enemies on account of it.

But a judge is required to learn what the facts are, and he cannot go by public opinion. That is the problem Senator East has got—trying to cope with public opinion. I cannot cope with public opinion in dealing with the rights of man under the Constitution, the law of the land. I cannot go by a vote of the neighbors or the electorate at large.

Senator BAUCUS. You are suggesting then, or implying, that under our form of government if the vast majority—say, an extraordinary majority of the American people—disagree with how the Supreme Court interprets the Constitution, the Congress and the States should amend the Constitution? That is the implication of what you are saying.

Judge MCMILLAN. That is it. It is in this paper somewhere. I thought it was a pretty good piece of writing, but I do not think it was a good enough piece of writing to be able to find it now. [Laughter.]

You see, I cannot be sore, displeased, or critical of people who come into this area without any background of factual information and feel as Senator East does. I felt the same way as a judge until I sat and listened.

Senator BAUCUS. Senator Helms in his statement in opposition to busing went through a long list of busing mileage, gasoline consumed, accidents, et cetera. Do you know what percentage of all busing for education in Charlotte-Mecklenburg is for the purpose of implementing desegregation?

Judge MCMILLAN. The superintendent estimates that it is around one-fourth of the children being transported. The percentage of the school budget is less than 1 percent—less than 2 days' cost of school operation.

Senator BAUCUS. What percentage of all busing for educational purpose is for the purpose of implementing desegregation? My understanding is that it is between 2 percent and 5 percent of all busing—that is nationally.

Judge MCMILLAN. I do not really know.

Senator BAUCUS. That is, of all busing for education, 2 to 5 percent is for the purpose of achieving desegregation.

Judge MCMILLAN. It may not be more than that, but I do not really know. I have seen those figures.

Senator BAUCUS. Could you tell us which of the proposed findings in this bill you agree with and which ones do you not agree with? Have you had a chance to look at the bill? There are 11 findings on pages 2 and 3.

Judge MCMILLAN. I have been over that—it is not 1167. Is it not 1137 or 1127?

Senator BAUCUS. At least under section 2(b) there are 11 findings. There are obviously other parts of the bill that you may agree or disagree with.

Judge MCMILLAN. It is 1147.

Senator BAUCUS. 1647.

Judge MCMILLAN. I think I have answered that question in the things that I have said up to now. I will comment very briefly: The social peace and racial harmony is not, according to the superintendent and according to the papers, a problem in Charlotte. The quality of public education—if anybody studies it—has definitely improved. There has been no debilitation of public education or public resources.

The community support for public education is strong. It does not deny the right of racially neutral treatment, because racially neutral treatment is not available when you build a school so far away from where people live that they have to get there by State-supplied transportation.

I would rather not dwell on that, because I think the information in this paper to which I have alluded does indicate, as I said at the outset, that I believe the factual assertions made in the proposed bill are not borne out by any evidence I have seen; and I have seen a lot of evidence.

.Senator BAUCUS. Tom Wicker of the New York Times recently reported that there was a testimonial dinner in Charlotte in your honor. I am wondering what that testimonial signifies to you. I understand that in the earlier stages of this case such a dinner would probably not have been held.

Judge MCMILLAN. I would rather not talk about testimonial dinners. It would not have been possible 10 years ago.

Senator BAUCUS. Thank you very much, Judge.

Senator EAST. Senator Heflin?

Senator HEFLIN. Judge, how long has it been since in North Carolina there has been a lawsuit in which busing was ordered?

Judge MCMILLAN. I do not really know. There is no press about it. Nothing comes in the Federal reports, and I do not have any pipeline to other judges. But I would say it has been a number of years—probably 7 or 8.

There was an attack on the Charlotte plan by a group of people newly moved to Charlotte—most of them—and the school board took over the defense of it and said, "Let us alone; we don't want to change it; we like it the way it is going"; and the Circuit Court and the Supreme Court affirmed it.

The answer to your question is that I do not know; but I would guess 7 or 8 years, maybe more.

Senator HEFLIN. Do you know how many school districts there are in the State of North Carolina?

Judge MCMILLAN. I do not. We have a patchwork. We have got what I would call a pepper and salt distribution of children in rural areas and a black-and-white checkerboard distribution in the cities. This is typical of America. But there are hundreds of school districts, possibly thousands.

Senator HEFLIN. As regards school systems, in my State we have generally city systems and county systems. I suppose they have the same thing in North Carolina. Practically all of the school systems in the State of North Carolina are now under some court order designed to bring about integration.

Judge MCMILLAN. Most of them are not.

Senator HEFLIN. Most of them are not?

Judge MCMILLAN. No.

Senator HEFLIN. In my State of Alabama, there are 127 school systems; all but 3 are under some court order pertaining to integration of the schools and elimination of segregation.

In most of the instances, for practically all purposes those decrees and orders were issued 10 or 12 years ago; and there have not been any busing decrees or orders much in the last 7, 8, or 10 years. It is pretty well established whatever the school districts will be. This means, in reviewing my State—and I believe it is fairly typical of the South—any initiation of busing or new busing has occurred. Is that a fairly general situation that you would think existed in the South today?

Judge **McMillan**. I think so. I think the South has done a lot more about dealing with the problem than the North has. It sounds physically easier. I am not so sure it is. It is only a 15- to 20-minute ride from the South End to the North End in Boston.

It may be that our understanding that it would be hard to desegregate the schools of a city is just ignorance. I do not know, because I have never had to do it. Charlotte population is about one third of a million; the county, of which Charlotte is a part, with a little over 400,000.

I agree. I think that as far as North Carolina is concerned this is not a live issue.

Senator **Heflin**. In other words, it would be a rare instance in which there would be busing to be decreed in North Carolina or anywhere in the South in the future.

Judge **McMillan**. That is a prediction. It could be true. I just do not know.

Senator **Heflin**. In my State, for all practical purposes if there is going to be busing, it has already been ordered and it was ordered 10 years ago.

In the city of Birmingham, which has a school district, that suit was filed 20 years ago. Recently they settled it by entering into permanent orders of the court. Some of it had been temporary, seeing how to do it. They got together, and they worked it out where there was no busing. I assume that Birmingham and others may be in similar situations.

If we deprive the Federal court of being able to issue any orders directly or indirectly affecting busing, or if we deprive the Department of Justice from expending any money which directly or indirectly affects busing, we will not be stopping busing, as I see it; we will be removing the ability to modify, reduce, or possibly eliminate busing.

The language of this bill and the language of all of these bills, as far as I can tell, really, for those who are opposing busing, is about 10 years too late if it were to accomplish the purpose.

The present status in the South is basically a matter of existing busing, and the court proceedings that will arise will be modifications or elimination and reduction of busing. Then, in effect, this bill here will prevent that.

Have you had any instances come up because of individual hardships or efforts to modify busing orders as they would affect certain routes and certain other things?

Judge **McMillan**. Oh, yes. This order that I entered in *Swann*, first in 1969, was modified a number of times over a period of 3 or 4 years. I think I stuck some figures on here.

Anyhow, the percentage of children attending a school has never had any magic significance to me. Every time a reasonable request for modification has come up, I have allowed it after the first break-in period until the school board had a majority which was willing to accept the necessity for doing it.

The ratios of the schools have varied all over the lot. The first order I entered was 3 to 41 percent, and the ratios today—if I recall the facts correctly—are somewhere between 17 and 85 percent or so. There are 8 or 10 that are more than half black in a community that is about one-third black.

All such modifications have been allowed, and I think it has left the board in charge of a system which is not dealing with ratios but dealing with the operation of an unsegregated school system. Ratio has never been anything magic or inviolate.

Senator HEFLIN. Would you say that the majority of your modification decrees and orders have been towards reducing the requirement of busing?

Judge MCMILLAN. Yes, sir. The only express order that was ever entered by me in Charlotte that prescribed how the students should be distributed said, "Here is what you do unless you come up with something that you think is better." They came up with something they thought was better—a substantial deviation from the original—and I accepted it.

Yes, it went on over a period of several years.

I do have the impression, Senator, as you announced a while ago, that it is a quiet issue in most of the South. Certainly it is at home.

Senator HEFLIN. The effect of this could be anti-South and pro-North. In other words, it would be eliminating the right of busing to be used in those States in the North where they have been reluctant to go towards immigration.

Judge MCMILLAN. I think that is a fair proposition.

Senator HEFLIN. And in the South at this stage, where modification, reductions, and eliminations are what the vast amount of court orders would be, this bill would prevent that from occurring, if it is constitutional.

Judge MCMILLAN. You have stated an assumption that the bill would not allow a relaxation of what is being required under existing southern court orders. I do not hear that in the rhetoric about it, and I have not studied the proposed bill.

Senator HEFLIN. The bill provides that no inferior court or any judge can have jurisdiction to issue any order respecting any judgment decree pertaining to busing.

Judge MCMILLAN. I do not think the bill will retain that language.

Senator HEFLIN. I am saying that is the way it exists right at this time.

Judge MCMILLAN. You are right.

Senator HEFLIN. That is all I have.

Senator EAST. Thank you, Senator.

For the sake of time, judge, is your schedule somewhat flexible? I think we have perhaps finished with the line of questioning.

I would like to clarify the language of S. 1647 referred to by my distinguished colleague. The bill does not prohibit orders "pertaining" to busing, it prohibits orders requiring busing. In addition, it prevents the enforcement of existing orders and therefore does provide relief to southern States.

In deference to our distinguished ranking member here, Senator Baucus, who needs to leave at 12:30, I would like to bring up the Assistant Attorney General who is with us this morning and let him make a brief statement of administration policy on this. Then I am going to yield to Senator Baucus so that he can question him and get out of here, since he has a very close deadline to meet and he has very faithfully been with us on all of our hearings this year on a variety of things. I deeply appreciate his fidelity to the subcommittee, and I would like to make every effort to accommodate his very reasonable and understandable request this morning.

I do not mean to unduly impose upon your time, judge. Perhaps you are under some time constraints?

Judge **McMillan**. No; I will be here.

Senator **East**. If you would not mind, we could let Mr. Reynolds come up and give his testimony; and then if Senator Heflin had any additional questions of you or if I had a followup question we might do that. Then we will turn to our third panel and make sure that they all have an opportunity to get their statements in.

Thank you, judge.

Judge **McMillan**. In case you were going to get away before the hearing were over, I would like to come and speak to you because you are my Senator but we are 200 miles apart.

Senator **East**. Well, I appreciate that. And you are my judge in a way, too.

Thank you, sir. We appreciate your coming. You have been very kind.

Judge **McMillan**. Thank you, Senator.

[The prepared statement and other submissions of Judge McMillan follow:]

PREPARED STATEMENT OF JUDGE JAMES B. MCMILLAN

I.

PRELIMINARY STATEMENT

Please consider me not an advocate but a reporter -- one who, after thousands of hours of evidence and study and observation, has recorded a lot of information and has been led to some conclusions. The value of what I say depends on the weight of the facts reported, rather than on my personal opinions.

I am a North Carolinian. I was raised to respect America's traditions and institutions.

Two of my great, great grandfathers named Outlaw fought in the Revolutionary War. A great, great uncle named John Grady fought at Moore's Creek Bridge, a pre-Revolutionary battle of 1775, and had the poor judgment to be the only Whig killed in that skirmish! Some of my people once owned slaves, in small and large numbers. Most of them, like the McMillans, did not. My Grandfather Outlaw and my Great Grandfather Whitfield fought on the "right" side in the Civil War against the Yankee oppressors. I served four years in the Navy in World War II; my younger brother was killed flying an Air Force B-29 over Japan in World War II, and is buried in Arlington, just across the river from here. I was raised at McDonalds in Robeson County, North Carolina which had an almost 100% native population with roots going back hundreds of years, approximately one-third Indian, one-third white and one-third black. Money was scarce. The economy was a tenant farming economy. I am a traditional Southerner with a pride in the South; and though I never saw anyone in my family mistreat a black person for any reason, I accepted for all of my early life the proposition that the ways of white people and the ways of black people were ordained to be different.

College at the University of North Carolina at Chapel Hill did little to disturb my acceptance of apartheid as a way of life. Three years at Harvard Law School were totally neutral on race questions; there were no women, and there were only four black males in a student body of 1,550. Boston was, in fact, as thoroughly segregated as North Carolina.

In 1963, in response to a request to talk about race relations before the Law Review Association of the University of North Carolina, I said:

> School boards should be encouraged rather than discouraged to draw school districts and make pupil assignments without substantial regard to race. At the same time, may we be forever saved from the folly of the New York authorities who have reportedly gone to the wild extreme of requiring that pupils be transported far away from their natural habitat so that some artificial "average" of racial balance might be maintained. The location of schools and the use of bond money to construct them should be planned so that schools are accessible to pupils and so that concern about the color of the probable students should not unduly overbalance the availability of the schools and the cost of maintaining them.

Five years later, my factual education began, and my uninformed 1963 Olympian certainty about "bussing" had to give way under the hard light of fact.

I found myself as a new federal judge, in 1968, faced with a motion to re-open and relitigate Swann v. Charlotte-Mecklenburg Board of Education.

My reaction to the revived prosecution of the suit was "What's going on here?" The Charlotte schools for many decades had been, I thought, models of excellence. Many black children were going to "white" schools. In the rural areas, where white and black people lived together in a "pepper and salt" pattern instead of a "checkerboard" pattern, a few schools were genuinely desegregated. I could not understand how anybody should complain about the Charlotte-Mecklenburg schools nor insist that stronger measures were necessary to afford equal opportunity to the black children.

Reluctantly, I set the case for hearing.

Reluctantly, but with increasing understanding, I listened and learned, and recorded what I learned.

Though opinions differed as to remedies, the findings of fact on which my various orders were made were never in serious conflict. They were based upon admissions or stipulations of the parties; upon uncontradicted testimony of school officials and agents; upon official records of county, city and state governments; upon recorded history of legislative and official action; on visiting, seeing and smelling the "black" and "white" schools; on the history of zoning, taxing, and appropriating and upon the regulating of schools and the places they stand and the places they used to stand; upon census records of the migration of families in America (more than one family out of five moves its residence every year); on the gap (several grades in 1968 but now considerably less) between the performance of black and white children; and upon the incredible number (seventeen fine-print pages) of state statutes and regulations which segregated the races of North Carolina in every particular and in every phase of life from the cradle to the grave.

And so I concluded, after lengthy hearings and rehearings and study of hundreds of pounds of exhibits, including walls full of charts and diagrams and statistics, that some changes should be made.

I asked the School Board to make those changes on their own and (except for partial desegregation of the faculties) they declined. The invitation was repeated several times by formal order throughout 1969, and a consistent five to four majority of the board declined the invitation. Ultimately, sixteen months after the reopening of the case, I appointed a consultant, Dr. Jack Finger of Providence, Rhode Island, to draw a plan for desegregation of the metropolitan center of the county. He prepared a thoroughly workable plan which I approved. Certain members of the school staff, never identified by name to me, urged that the plan incorporate the entire district (the entire county, 540 square miles), rather than follow the less than complete remedy which, in appropriate "judicial restraint," I had been willing to accept. The board majority again declined to adopt that plan or any plan for further desegregation, and that plan, including a direction to provide transportation where needed, was ordered into effect on February 5, 1970. 311 F.Supp. 265.

The Circuit Court of Appeals affirmed every finding of fact and every conclusion of law which I had made. (So, later, did the Supreme Court.) However, the Circuit Court of Appeals reversed the order, as to elementary schools only, upon the theory that "the board ... should not be required to undertake *such extensive* additional bussing ..." (Emphasis added.) Efforts to desegregate schools, that court held, should be "reasonable." They sent the district court back to the drawing board to study and write some more about whether it was "reasonable" to desegregate the elementary schools by requiring enough bussing to do a complete job.

Extensive further hearings were held and more evidence was considered during the spring and summer of 1970. The more I learned, the heavier the evidence became in favor of the "reasonableness" of the original order.

The pages following contain excerpts from various published and unpublished orders and findings of fact which were entered in the *Swann* case, including the order of August 3, 1970, 318 F.Supp. 786.

I have entered no orders in the *Swann* case since 1975. The new Board itself actively resisted efforts made in *Martin, et al. v. Charlotte-Mecklenburg Board of Education*, 475 F.Supp. 1318 (1979) to nullify the results of the *Swann* decision. The Board is in total control of the schools.

None of the statements that follow are intended as criticism of former boards and government agencies; they are simply recitals of basic history and government action which led to and perpetuated segregation of the races, including segregation in schools.

II.

WHAT I LEARNED ABOUT SEGREGATION.

1. SEGREGATION IS CAUSED BY GOVERNMENT ACTION.

Charlotte (270,000-plus)[*1] sits in the center of Mecklenburg County (550 square miles, total population over 335,000).[*2] The central city may be likened to an automobile hub cap, the perimeter area to a wheel, and the county area to the rubber tire. Tryon Street and the Southern Railroad run generally through the county and the city from northeast to southwest. Trade Street runs generally northwest to southeast and crosses Tryon Street at the center of town at Independence Square. Charlotte originally grew along the Southern railroad tracks. Textile mills with mill villages, once almost entirely white, were built. Business and other industry followed the highways and the railroad. The railroad and parallel highways and business and industrial development formed something of a barrier between east and west.

By the end of World War II many Negro families lived in the center of Charlotte just east of Independence Square in what is known as the First Ward—Second Ward—Cherry—Brooklyn area. However, the bulk of Charlotte's black population lived west of the railroad and Tryon Street, and north of Trade Street, in the northwest part of town. The high priced, almost exclusively white, country was east of Tryon Street and south of Trade in the Myers Park — Providence — Sharon — Eastover areas. Charlotte thus had a very high degree of segregation of housing before the first *Brown* decision.

Among the forces which brought about these concentrations should be listed the original location of industry along and to the west of the Southern Railroad; the location of Johnson C. Smith University two miles west of Tryon Street; the choice of builders in the early 1900's to go south and east instead of west for high priced dwelling construction; the effect of private action and public law on choice of dwelling sites by black and by white purchasers or renters; real estate zoning which began in 1947; and the economics of the situation which are that Negroes have earned less money and have been less able to buy or rent expensive living quarters.

Local zoning ordinances starting in 1947 generally allow more varied uses in the west than in the east. Few if any areas identified as black have a residential restriction stronger than R-6, which means that a house can be built on a lot as small as 6,000 square feet. Zoning restrictions in other areas go as high as 12,000 and 15,000 square feet per lot. Nearly all industrial land in the city is in the west. The airport in the southwest with its jet air traffic inhibits residential development. Many black citizens live in areas zoned industrial, which means that the zoning law places no restriction on the use of the land. The zoning laws follow the pattern of low cost housing and industry to the west and high cost housing with some business and office developments to the east.

City planning has followed the same pattern.

Tryon Street and the Southern railroad were not built to segregate races. In the last fifteen years grade crossings have been eliminated at great expense at Fourth Street, Trade Street, Twelfth Street and Independence Boulevard; and an elevated half-mile bridge, the Brodie Griffith Skyway, is now being built across the railroad in North Charlotte at a cost of more than three million dollars. The ramparts are being pierced in many spots and inner-city highways now under construction will make communication much simpler.

However, concentration of Negroes in the northwest continues. Under the urban renewal program thousands of Negroes were moved out of their shotgun houses in the center of town and have relocated in the low rent areas to the west. This relocation of course involved many ad hoc decisions by individuals and by city, county, state and federal governments. Federal agencies (which hold the strings to large federal purses) reportedly disclaim any responsibility for the direction of the migration; they reportedly say that the selection of urban renewal sites and the relocation of displaced persons are matters of decision ("freedom of choice"?) by local individuals and governments.. This may be correct; the clear fact however is that the displacement occurred with heavy federal financing and with active participation by local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon—railroad area, or on its immediate eastern fringes.

Onto this migration the 1965 school zone plan with freedom of transfer was superimposed. The Board accurately predicted that black pupils would be moved out of their midtown shotgun housing and that white residents would continue to move generally south and east. Schools were built to meet both groups. Black or nearly black schools resulted in the northwest and white or nearly all white schools resulted in the east and southeast. Freedom of students of both races to transfer freely to schools of their own choices has resulted in resegregation of some schools which were temporarily desegregated. The effect of closing the black inner-city schools and allowing free choices has in overall result tended to perpetuate and promote segregation. (Emphasis added.)

[*1] now 330,000-plus
[*2] now 400,000-plus

300 F.Supp. 1358, 1365-66 (W.D. N.C. 1963).

> Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" schools or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.
>
> The schools are still in major part segregated or "dual" rather than desegregated or "unitary."
>
> The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accomodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *"de facto,"* and the resulting schools are not "unitary" or desegregated.

306 F.Supp. 1299, 1304 (1969).

* * *

> Segregation of black children into black schools is *not* because of residential patterns, but because of assignment and other policies of the School Board, including the call upon segregated housing and school site selection to lend respectability to those policies.

318 F.Supp. 786, 789 (1970).

2. SEGREGATION, NORTH AND SOUTH, HAS ITS ROOTS IN LAW.--Attached to this paper are seventeen pages of excerpts from the Constitution and the General Statutes of North Carolina mandating total separation of races in virtually all human activity. Racially restrictive covenants were not eliminated from federally guaranteed home loans until a decade or so ago. All southern states and most border states and numerous others had laws and ordinances separating the races. Though the northern states had little or no slavery, they had widespread segregation in practice and in fact. Vann Woodward, a distinguished U.N.C. and Yale historian, former president of the American Historical

Association, in his book, "THE STRANGE CAREER OF JIM CROW," cites numbers of instances of segregation of black people, by law, north and south, in railroads, omnibuses, stage coaches and steamboats; in theatres and lecture halls, in black pews in white churches; in public accommodations and housing (pp. 18-19). Woodward says (pp. 19-20):

> Generally speaking, the farther west the Negro went in the free states the harsher he found the proscription and segregation. Indiana, Illinois, and Oregon incorporated in their constitutions provisions restricting the admission of Negroes to their borders, and most states carved from the old Northwest Territory either barred Negroes in some degree or required that they post bond guaranteeing good behavior. Alexis de Tocqueville was amazed at the depth of racial bias he encountered in the North. 'The prejudice of race,' he wrote, 'appears to be stronger in the states that have abolished slavery than in those where it still exists; and nowhere is it so intolerant as in those states where servitude has never been known.'

Lincoln, the great emancipator, expressed the view, a short time before his election to the Presidency, that he did not favor social nor even political equality of whites and blacks, and that blacks were inferior and should be kept in a status inferior to Whites (Woodward, p. 21).

The wildest display of hatred of blacks which I have ever heard was two years ago at an outdoor sidewalk care at the Quincy Market in Boston, in the shadow of Faneuil Hall. (The speaker said he was the principal of a Boston public school.)

The increasing sweep of Jim Crow legislation in southern and border states in the latter part of the 19th Century received the full blessing of the Supreme Court in Plessy v. Ferguson, (1896) with its "separate but equal" ruling justifying segregation. Some of the worst race riots of the post-World War II era occurred in Chicago in 1919 and in Detroit in 1967 (Woodward, pp. 114, 190). Segregation of the Armed Forces lasted through World War II (Woodward, pp. 136-7). Blacks in northern cities find themselves concentrated in black schools and black neighborhoods (Woodward, pp. 192-3).

By the early 1970's the urban schools of the north were as thoroughly segregated as the schools of the south. "Boston, for example, found its public school system was more tightly segregated than that of any southern city of importance below Washington" (Woodward, p. 212).

Segregation is not unique to the south.

3. SEGREGATION IMPAIRS STUDENT ACHIEVEMENT. HOWEVER, SEGREGATION IS UNLAWFUL REGARDLESS OF STUDENT ACHIEVEMENT.

> The uncontradicted evidence before the court is that segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children. By way of brief illustration a table follows showing the contrasting achievements of sixth grade students in five of the closed schools (Bethune, Fairview, Isabella Wyche, Alexander Street and Zeb Vance) and in five of the schools to which black students are going to be transferred:

AVERAGE ACHIEVEMENT TEST SCORES
SIXTH GRADE—1968–69

	SP.	LANG.	ACM. (Math)	WM (Word Meaning)
(Bethune	45	34	41	41
(Ashley Park	61	62	56	58
(Fairview	46	38	42	39
(Westerly Hills	61	61	52	57
(Isabella Wyche	41	34	40	38
(Myers Park	80	84	58	73
(Alexander Street	45	38	34	40
(Shamrock Gardens	57	62	53	56
(Zeb Vance	38	34	39	42
(Park Road	71	75	58	66

> **This alarming contrast in performance is obviously not known to school patrons generally.**
>
> **It was not fully known to the court before he studied the evidence in the case.**
>
> **It can not be explained solely in terms of cultural, racial or family background without honestly facing the impact of segregation.**
>
> **The degree to which this contrast pervade all levels of academic activity and accomplishment in segregated schools is relentlessly demonstrated.**
>
> **Segregation produces inferior education, and it makes little difference whether the school is hot and decrepit or modern and air-conditioned.**
>
> **It is painfully apparent that "quality education" can not live in a segregated school; *segregation itself is the greatest barrier to quality education.***

306 F.Supp. 1291, 1296-7 (1969).

The following table further illustrates the results. Groups A and B show that sixth graders, in the seven 100% black schools the plan would retain, perform at about fourth grade levels, while their counterparts in the nine 100% white elementary schools perform at fifth to seventh grade levels. Group C shows that sixth graders in Barringer, which changed in three years from 100% middle income white to 84% Negro, showed a performance drop of 1½ to 2 years. Group D shows however that Randolph Road, 72% white and 28% Negro, has eighth grade performance results approximately comparable to Eastway, which is 96% white, and Randolph results are approximately two years ahead of all-black Williams and Northwest. Until unlawful segregation is eliminated, it is idle to speculate whether some of this gap can be charged to racial differences or to "socio-economic-cultural" lag. (Emphasis added.)

AVERAGE ACHIEVEMENT TEST SCORES, GRADE 6, REPORTED IN GRADE EQUIVALENT, 1965-66/1968-69

GROUP A - 100% Black Elementary

	WM	PM	SP	LANG	ACM	ACR	AAPP	SS	SC
Billingsville	37/39	39/42	43/45	36/37	37/38	41/44	38/39	42/43	37/38
Marie Davis	42/43	42/44	49/48	39/41	43/45	45/48	43/41	43/45	39/40
Double Oaks	44/40	42/40	49/46	35/36	41/39	45/44	41/37	44/40	41/37
First Ward	43/40	42/41	50/48	39/36	40/39	44/46	43/41	48/44	42/40
Lincoln Heights	45/44	44/44	52/49	44/42	45/43	46/48	43/41	47/46	42/41
Oaklawn	44/44	42/45	50/53	42/47	41/45	50/49	43/44	41/49	40/47
University Park	44/44	44/47	51/48	43/43	40/44	46/48	41/44	46/46	41/43

GROUP B - 100% White Elementary

	WM	PM	SP	LANG	ACM	ACR	AAPP	SS	SC
Devonshire	52/59	54/62	57/60	57/64	49/53	53/63	55/59	57/64	57/65
Hidden Valley	/59	/62	/61	/62	/51	/60	/59	/64	/67
Merry Oaks	62/60	66/66	66/67	66/71	53/54	59/65	67/64	70/68	73/72
Montclaire	66/67	68/72	69/70	71/76	58/60	61/67	66/68	70/71	76/77
Pinewood	67/64	68/68	71/68	71/71	58/61	62/67	68/71	72/71	73/70
Rama Road	68/67	68/72	70/71	73/76	58/61	64/67	70/70	72/73	76/78
Shamrock Gardens	59/56	61/57	66/57	64/62	52/53	58/57	63/57	65/61	62/61
Thomasboro	58/55	59/55	63/58	59/58	52/51	55/57	60/56	63/59	64/61
Windsor Park	61/64	63/68	61/66	65/69	55/53	59/63	63/62	65/69	67/72

GROUP C - Barringer

	WM	PM	SP	LANG	ACM	ACR	AAPP	SS	SC
Barringer	61*/46@	63*/46@	64*/50@	66*/47@	53*/45@	59*/48@	64*/44@	65*/47@	68*/45@

*100% white in 1965
@ 84% black in 1968-69

AVERAGE ACHIEVEMENT TEST SCORES, GRADE 8, REPORTED IN GRADE EQUIVALENT, 1965-66/1968-69

GROUP D - Junior High

	PM	SP	LANG	ACM	ACR	AAPP	SS	SC
Randolph Road (28% black)	/80	/82	/79	/62	/79	/76	/79	/81
Williams (100% black)	55/52	67/64	55/52	52/49	58/61	58/55	56/56	55/56
Northwest (100% black)	59/58	73/71	59/56	54/50	60/61	58/58	59/57	59/58
Eastway (96% white)	84/82	85/86	83/81	74/67	79/82	81/75	83/82	87/87

[A668]

306 F. Supp. 1299, 1308-9 (1969).

The same pattern continued in 1970:

THE EXTENT OF CONTINUED SEGREGATION—AND ITS RESULTS.

* * *

The tangible results of segregation continue to be apparent from the 1969–70 Stanford Achievement Tests in Paragraph Meaning and Arithmetic, given during the sixth month of school, for grades 3, 6, 8 and 10. In "black" schools third graders perform at first grade or early second grade levels, while their contemporaries at "white" schools perform at levels generally from one to two grades higher. Sixth graders in black schools (Double Oaks and Bruns Avenue, for example) perform at third grade levels while their contemporaries at Olde Providence, Pinewood, Lansdowne and Myers Park perform at seventh or eighth grade levels. In the eighth grade we see Piedmont Junior High students reading at early fifth grade levels while their cntemporaries at McClintock and Alexander Graham read at early ninth grade levels. In the tenth grade, on a scale where the *average* is 50, the black high school, West Charlotte, had English scores of 38.30 and mathematics scores of 35.89; Harding, nearly half black, had scores of 42.89 and 40.76; while the obviously "white" schools had scores ranging from 43.2 to 52.2. At First Ward Elementary School only two black *third* graders out of 119 tested scored as high as third grade, while 100 were still at first grade level of proficiency as to paragraph meaning.

Of factors affecting educational progress of black children, segregation appears to be *the factor under control of the state* which still constitutes the greatest deterrent to achievement. (Additional emphasis added.)

318 F.Supp. 786, 791

* * * * *

***The duty to desegregate schools does not depend upon the Coleman report, nor on any particular racial proportion of students.*—The essence of the *Brown* decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and breadth of experience, and that the segregated education itself is inherently unequal. The tests which show the poor performance of segregated children are evidence showing one result of segregation. Segregation would not become lawful, however, if all children scored equally on the tests.**

318 F.Supp. 786, 794.

[In other words, we can't make blacks go to the rear of the bus just because the back seats are as close to the exit as the front seats.]

4. Bussing is necessary, legal, cheap, safe and practical.--The facts about "bussing" in Charlotte-Mecklenburg were recorded in many published and unpublished orders. They are summarized most comprehensively in the August 5, 1970 order, 318 F.Supp. 786 (1970), pages 794 through 799 (reproduced in part below). In brief summary, the undisputed facts were that bussing is necessary; that about three-fifths of the public school students of North Carolina ride school busses every day; that over 70% of these riders are

in grades one through eight, with first graders more numerous than any others; that school bus transportation is safer and cheaper than any other form of transportation; that school bussing to preserve segregation before Swann included average daily bus travel of over forty miles a day and average one way bus rides of one hour and fifteen minutes; that the system functions adequately and safely with high school students as drivers; that the School Board and State had plenty of busses available to comply with the court order without buying new ones; that travel distance for the program ordered by the court was shorter than travel times already being required, even of kindergarten students; that the cost of transporting the additional students involved was less Than the cost of two days of school operation and less than 1% of the annual school budget. Some of those detailed findings appear below.

> Until the end of the 1969–70 school year, state law and regulations authorized bus transportation for almost all public school children who lived more than 1½ miles from the school to which they were assigned. The excluded few were those inner-city children who both lived and attended school within the old (pre-1957) city limits.
>
> If an inner-city child was assigned to a suburban or a rural school, or if a rural or suburban child was assigned to an inner-city school, he *was* entitled to bus transport.
>
> Under those regulations, virtually all the children covered by the court order of February 5, 1970, were entitled to bus transport under *then existing* state regulations *even if the order of this court had not mentioned transportation.*
>
> In Sparrow v. Gill, D.C., 304 F.Supp. 86 (1969), a three-judge federal court ordered an end to the discrimination against the inner-city children (and thereby in effect ordered bus transport for those children) by requiring the school authorities to discontinue transport for suburban children unless they also offered it to inner-city children.
>
> The state authorities have announced intention and promulgated rules to comply with this decision by providing transport on the usual basis for *all* city children who live over 1½ miles from school.
>
> The local School Board, in its last plan for partial elementary desegregation, stated that
>
> > "Transportation will be provided to and from school for all students who are entitled thereto under state law and applicable rules and regulations promulgated by the State."
>
> (Without such transportation even the Board's own plan would have left children, in numbers they estimate at nearly 5,000, assigned to schools too far away to reach.)
>
> In view of the above facts, every child assigned to any school over 1½ miles from his home is entitled to bus transportation in North Carolina.
>
> The issue is not, "Shall we bus children?" but "Shall we *withhold* transportation already available?"
>
> In Griffin v. Prince Edward County, 377 U.S. 218, 84 S.Ct. 1226 (1964), the Supreme Court held that a county could be required to recreate an entire public school system rather than keep it closed to avoid desegregation. The same principle would seem to apply here.

318 F. Supp. 786, 792 (1970).

* * * * *

THE REASONABLENESS OF THE SPECIFIC METHODS AND THE OVERALL PLANS AVAILABLE TO DESEGREGATE THE BLACK CHARLOTTE SCHOOLS.

A. *The facts under which any question of "reasonableness" must be judged.*—From the lengthy and largely repetitious testimony at the July 15–24 hearings, and from previous evidence, the following facts bearing on "reasonableness" are found:

1. In North Carolina the school bus has been used for half a century to transport children to *segregated consolidated* schools. Last year 610,000 children, comprising nearly 55% of the state's public school population, were transported daily on school busses. With the 1970 extension of transportation to inner-city children, the average daily school bus population of North Carolina this September will reach perhaps three-fifths of all public school children. Those eligible for transport are far more numerous. The "anti-bussing law" has been held unconstitutional.

2. Some 70.9% of these bussed children are in the first eight grades. There may be more first graders than children of any other age riding school busses.

3. The academic achievement tests quoted in this and previous orders show that the later desegregation is postponed in this school district the greater the academic penalties are for the black children. By the sixth grade the performance gap is several grades wide. By the eighth grade it may be four grades wide.

4. School bus transportation is safer than any other form of transportation for school children.

5. The defendants have come forward with no program nor intelligible description of "compensatory education," and they advance no theory by which segregated schools can be made equal to unsegregated schools.

6. In Charlotte-Mecklenburg approximately 23,300 children in grades one through twelve (plus more than 700 kindergarten children, ages four and five) ride some 280 school busses to school every day. The school bus routes for the four and five year olds vary from seven miles to thirty-nine miles, one way. The average one way bus route in the system today is about an hour and fif-

318 F. Supp. 786, 794 (1970).

teen minutes. Average daily bus travel exceeds forty miles.

7. Approximately 5,000 children of all ages rode public transportation (City Coach Company) every day of the 1969–70 school year at reduced fares, or 20¢ a day (10¢ each trip).

* * *

9. There are only two adult male drivers out of some two hundred and eighty regular bus drivers who drove school busses during the 1969–70 school year, and only about seventeen adult women who drove kindergarten school busses during that year. The other 260-plus drivers are boys and girls, 16, 17 and 18 years old.

10. There is no black residential area in this school system which is so large that the students can not be afforded a desegregated education by reasonable means. The additional length of travel required to implement the best available plans for desegregating the system is less than the average distance of bus transportation now being provided elementary children under existing bus practices, and the travel times are less than times required by existing bus routes.

11. The offer of transportation to encourage "freedom of choice" is ineffectual. It was expressly ordered by this court on April 23, 1969, and put into effect by the defendants in the fall of 1969; and it has had no substantial effect upon the exercise by black children of freedom of choice to go to white schools.

12. There is no "intractable remnant of segregation" in this school system. No part of the system is cut off from the rest of it, and there is no reasonable way to decide what remnant shall be deemed intractable.

13. The regular bus routes are about 280 in number, including 17 bus routes transporting four and five-year-old children to child development centers (kindergartens).

14. * * *

in addition to the 280 "regular" busses, the Board's bus assets include at least the following:

(i) Spare busses	20
(ii) Activity busses (each driven less than 1,000 miles a year)	20
(iii) Used busses replaced by new ones in 1969–70	30
(iv) New busses currently scheduled for replacement purposes and expected to be delivered in near future	28
Total:	107

15. It only requires, at the most, 138 busses to implement the court ordered plans for desegregation of all the high schools, junior high schools, and elementary schools in the county!

16. In addition to this, the State School Bus Transportation Department informed the local defendants in early 1970 that there were 75 new busses available to the local school system if they wanted them, out of the 400 new busses then held by the State.

* * *

318 F. Supp. 786, 795 (1970).

25. The Board's opinion evidence, including numerous exhibits, on numbers of pupils to be transported and numbers of extra busses required (526 for the entire system, 293 for elementary schools) can not be taken seriously. The pupil count was made by counting all pupils in each zone who live more than a mile and a *quarter* (not a mile and a *half*) from each school, and (with some minor but unspecified adjustments) treating all of these children as requiring transportation. This method fails to account for several factors such as (1) the 7% who are absent every day; (2) the pupils now riding City Coach busses; (3) the pupils now already receiving school bus transport; (4) those who go to school in private vehicles.

Moreover, by cutting the "walking distance" from the statutory figure of 1½ miles to 1¼ miles, the Board method reduces by 40% (from over seven square miles to just over five square miles) the area of the walking zone and thereby sharply increases those eligible for bus transport.

318 F.Supp. 786, 796 (1970)

* * *

The court's previous findings on these items are re-affirmed. Maximum numbers of pupils to be transported and additional busses needed, even if Sparrow v. Gill were not in the picture, remain:

	No. Pupils	No. Busses
Senior High	1,500	20
Junior High	2,500	28
Elementary	9,300	90
	13,300	138

(Board witnesses after refining lines and making actual pupil assignments now say that the number of senior high pupils requiring transportation is 1,815 and the number of junior high pupils requiring transportation is 2,286.)

26. All plans which desegregate all the schools will require transporting approximately the same number of children. In overall cost, if a zone pupil assignment method is adopted, the minority Board plan may be a little cheaper than the Finger plan.

* * *

28. North Carolina, whose biennial 1969–71 budget is $3,590,902,142.00, regularly has a biennial surplus of many millions of dollars.

29. The annual cost of pupil transportation is approximately $20 a year per pupil; the state pays it all, except for certain minor local administrative costs, and the original purchase of the first bus for a route; thereafter, the state replaces the bus periodically. Earlier findings* that the cost was $40 per pupil per year were in error.

*See 300 F. Supp. 1370.

* * *

31. The $66,000,000 school budget amounts to about $366,667 a day for a 180-day school year. If the county eventually has to buy as many as 120 new busses, their cost, at $5,500 each, would be $660,000, which is less than the cost ($733,000) of two days of school operation.

32. *Age of children* has apparently never prevented their school bus transportation. There are, of course, more children between kindergarten and the sixth grade than there are in the higher grades when the dropout rate increases, and more elementary children, including first graders, receive transportation than do high schoolers.

The longest bus routes in the entire county are the routes by which four and five-year-old kindergarten children are transported to child development centers (see Principals' Monthly Bus Report, Defendants' Exhibit 63). The Pineville Child Development Center has one bus, No. 297, which travels over 79 miles a day on one round trip with four and five-year-old children. Another such trip is over 70 miles a day. The Davidson Child Development Center has five

318 F.Supp. 786, 797 (1970)

busses which travel from 48 to 60 miles a day on one round trip with five-year-old children. The Bain Elementary School has a bus route, No. 115, which travels over 61 miles on one round trip each day, requiring two hours in the morning and two hours in the afternoon with elementary children. Routes to numerous elementary schools are very long in miles and time. The more than 10,000 children in grades one through six who have been riding school busses all these years and who now ride at an average travel time of an hour and a quarter each way are not shown to have had their education damaged by the experience.

Educationally it appears unreasonable to postpone desegregation of small children until later grades. The only concrete evidence of an educational nature in the whole hearing which rose above the level of opinion is the Stanford Achievement Tests which show that the performance gap, which is ordinarily noticeable in the first grade, has become several grades wide by the time the segregated black child reaches the sixth grade. The lasting effects of segregation are minimized if it is eliminated at an early age. (Emphasis added.)

33. *Traffic problems.*—The county has over 160,000 passenger vehicles and nearly 30,000 trucks registered in it. It is estimated that the total number of automobile trips in the county daily other than truck trips is over 869,000. Traffic is heavy in most parts of the county. Since the so-called "cross-bussing" of the Finger plan or the minority plan will not contemplate pick up and discharge of pupils in the central business area, the busses added by the Finger plan or the minority Board plan will provide very little interference with normal flow of traffic. School busses are no wider than other busses (the law requires that this be so); they already use all the major streets and traffic arteries in the county and city every school morning of the year. There is no evidence to show that adding 138 school busses to the volume of existing traffic will provide any such impediment as should be measured against the constitutional rights of children. It would also appear that a school bus transporting 40 to 75 children should reduce traffic problems by cutting down on the number of automobiles that parents might otherwise be driving over the same roads.

34. The schools already operate on staggered schedules. Today, the opening and closing of schools and the class hours of school bus drivers are adjusted to serve the practical requirements of transportation. Plaintiffs' Exhibit 12 shows that the elementary schools already operate on a staggered opening and closing schedule. Some open at 8:00; some at 8:05; some at 8:10; some at 8:15; some at 8:25 and some at 8:30 and 8:45 in the morning, and the schools close for grades one and two at hours including 1:30; 1:35; 2:00; 2:15; 2:30; 2:45; 3:00; 3:05 and 3:10. The court finds that staggered opening and closing hours for elementary schools, and arrangement of class schedules of bus drivers for late arrival and early departure are facts of life which will not be eliminated by desegregation of the schools.

35. The defendants have plenty of money, plenty of know-how, plenty of busses on hand or available upon request, and plenty of capacity to implement the court ordered plan or the minority plan or any combination of the various plans. Their contentions to the contrary, and their five million dollar "estimates," when heard against the actual facts, border on fantasy! *

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* "There was a table set out under a tree in front of the house, and the March Hare and the Hatter were having tea at it * * *. The table was a large one, but the three were all crowded together at one corner of it. 'No room! No room!' they cried out when they saw Alice coming. 'There's *plenty* of room!' said Alice indignantly and she sat down in a large arm-chair at one end of the table." (Lewis Carroll, *Alice's Adventures in Wonderland*.)

5. TEACHERS WILL ACCEPT DESEGREGATED SCHOOLS.--Desegregation of faculties was accomplished in two years, painlessly and without any "flight" of white teachers from the schools. No doubt some white teachers did leave the school system; teachers do, every year. But to this day I have never received any evidence or information as to the name of a particular white teacher who resigned rather than teach black pupils!

6. "RACIAL BALANCE" IS NOT THE QUESTION.--

The so-called "Bussing" order of February 5, 1970 (311 F. Supp. 265, at 267-68, read as follows:

> **The order which follows is not based upon any requirement of "racial balance." The School Board, after four opportunities and nearly ten months of time, have failed to submit a lawful plan (one which desegregates all the schools). This default on their part leaves the court in the position of being forced to prepare or choose a lawful plan. The fairest way the court knows to deal with this situation was stated clearly in the December 1, 1969 order, as follows:**
>
> **"In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable."**

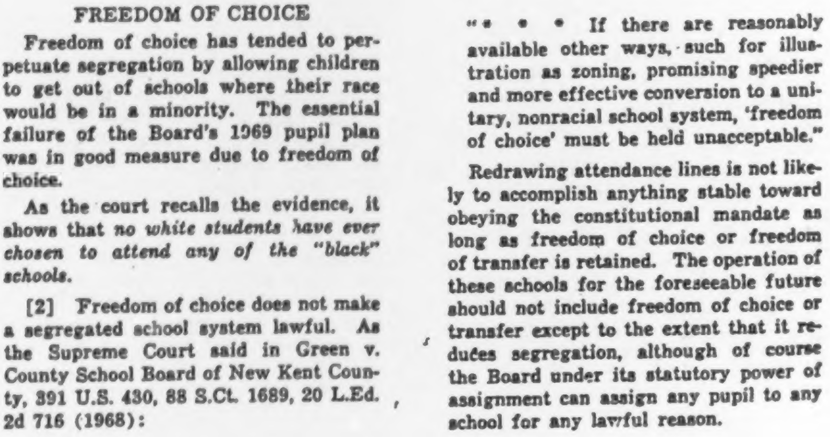
Then, in 318 F. Supp. 786, 792 (August 3, 1970), it is further pointed out.

> ***"Racial balance" is not required by this court.*** **— The November 7, 1969 order expressly contemplated wide variations in permissible school population; and the February 5, 1970 order approved plans for the schools with pupil populations varying from 3% at Bain Elementary to 41% at Cornelius. This is not racial balance but racial diversity. The purpose is not some fictitious "mix," but the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools.**
>
> ***"Bussing" is still an irrelevant issue.*** **— Until the end of the 1969–70 school year, state law and regulations authorized bus transportation for almost all public school children who lived more than 1½ miles from the school to which they were assigned. The excluded few were those inner-city children who both lived and attended school within the old (pre-1957) city limits.**
>
> **If an inner-city child was assigned to a suburban or a rural school, or if a rural or suburban child was assigned to an inner-city school, he *was* entitled to bus transport.**
>
> **Under those regulations, virtually all the children covered by the court order of February 5, 1970, were entitled to bus transport under *then existing* state regulations *even if the order of this court had not mentioned transportation.***
>
> **In Sparrow v. Gill, D.C., 304 F.Supp. 86 (1969), a three-judge federal court ordered an end to the discrimination against the inner-city children (and thereby in *effect* ordered bus transport for those children) by requiring the school authorities to discontinue transport for suburban children unless they also offered it to inner-city children.**
>
> **The state authorities have announced intention and promulgated rules to comply with this decision by providing transport on the usual basis for *all* city children who live over 1½ miles from school.**
>
> **The local School Board, in its last plan for partial elementary desegregation, stated that**
>
> > **"Transportation will be provided to and from school for all students who are entitled thereto under state law and applicable rules and regulations promulgated by the State."**
>
> **(Without such transportation even the Board's own plan would have left children, in numbers they estimate at nearly 5,000, assigned to schools too far away to reach.)**
>
> **In view of the above facts, every child assigned to any school over 1½ miles from his home is entitled to bus transportation in North Carolina.** (Emphasis added.)
>
> **The issue is not "Shall we bus children?" but "Shall we *withhold* transportation already available?"** (Emphasis added.)
>
> **In Griffin v. Prince Edward County, 377 U.S. 218, 84 S.Ct. 1226 (1964), the Supreme Court held that a county could be required to recreate an entire public school system rather than keep it closed to avoid desegregation. The same principle would seem to apply here.**

7. FREEDOM OF CHOICE IS IN PRACTICE A TOOL OF SEGREGATION.--"Freedom of choice" was a device to prserve segregation; it did not aid in eliminating segregation.

> "Freedom of choice" to pick a school has never been a right of North Carolina public school students. It has been a courtesy offered in recent years by some school boards, and its chief effect has been to preserve segregation.

Supplemental memorandum of March 21, 1970, pages 1-2.



FREEDOM OF CHOICE

Freedom of choice has tended to perpetuate segregation by allowing children to get out of schools where their race would be in a minority. The essential failure of the Board's 1969 pupil plan was in good measure due to freedom of choice.

As the court recalls the evidence, it shows that *no white students have ever chosen to attend any of the "black" schools.*

[2] Freedom of choice does not make a segregated school system lawful. As the Supreme Court said in Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed. 2d 716 (1968):

"* * * If there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

Redrawing attendance lines is not likely to accomplish anything stable toward obeying the constitutional mandate as long as freedom of choice or freedom of transfer is retained. The operation of these schools for the foreseeable future should not include freedom of choice or transfer except to the extent that it reduces segregation, although of course the Board under its statutory power of assignment can assign any pupil to any school for any lawful reason.

306 F.Supp. 1299, 1304 (1969).

The system of assigning pupils by "neighborhoods," with "freedom of choice" for both pupils and faculty, superimposed on an urban population pattern where Negro residents have become concentrated almost entirely in one quadrant of a city of 270,000, is racially discriminatory. This discrimination discourages initiative and makes quality education impossible. The quality of public education should not depend on the economic or racial accident of the neighborhood in which a child's parents have chosen to live—or find they must live—nor on the color of his skin. The neighborhood school concept never *prevented* statutory racial segregation; it may not now be validly used to *perpetuate* segregation.

300 F.Supp. 1358, 1360 (1969).

"'*Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects.* If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.'" Bowman v. County School Board [of Charles City County] 382 F.2d 326, 333 (C.A. 4th Cir., 1967) (concurring opinion).

"* * * Although the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

* * * * * *

"* * * The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."

(All emphasis added except for the word "required" in the first quoted paragraph and the word "now" in the fifth quoted paragraph.)

300 F.Supp. 1358, 1363 (1969).

Freedom of transfer increases rather than decreases segregation. The school superintendent testified that there would be, net, more than 1,200 additional white students going to predominantly black schools if freedom of transfer were abolished. The use of a free transfer provision is a decision for the board; it may make desegregation more palatable to the community at large; it is not, per se, if the schools are desegregated, unconstitutional. Nevertheless, *desegregation of schools is something that has to be accomplished independent of freedom of transfer.* This is a fact which because of the complexity of the statistics has only become clear to the court since the previous order was issued.

300 F.Supp. 1358, 1384 (1969).

8. THE USE OF "BUSSING," OF CONSTRUCTION, LOCATION AND SIZE OF SCHOOLS, THE LOCATION OF MOBILE CLASSROOM UNITS, AND THE CLOSING OF SCHOOLS AND THE REASSIGNMENT OF PUPILS HAVE BEEN TOOLS OF SEGREGATION AND DISCRIMINATION RATHER THAN OF DESEGREGATION AND EQUAL OPPORTUNITY.--

CONSTRUCTION, LOCATION AND CLOSING OF SCHOOL BUILDINGS CONTINUE TO PROMOTE SEGREGATION.

On April 23, 1969, it was found as a fact that the schools were still largely segregated, 300 F.Supp. 1358, 1367. Most children attended all-white or all-black schools. Second Ward was the only black high school in the center of the urban area. A bond issue had been passed and the School Board had money and plans to replace Second Ward with a Metropolitan High School, a specialty "magnet" school. Second Ward had a good central location, easily accessible to both blacks and whites, and an ideal spot for a high school to make desegregation of high schools easy. Shortly after desegregation was ordered on April 23, 1969, the School Board cancelled its plans for Metropolitan High School, 300 F.Supp. 1381, 1383. It was never built. This action has complicated and tremendously increased the cost and inconvenience of all subsequent activity to desegregate high schools.

In the summer of 1969 a school-closing desegregation plan was proposed by the Board. Its principal feature was the closing of seven all-black inner-city schools and the reassignment of the children to white schools. This plan was approved reluctantly, despite its excessive burdens on black children, because it appeared to promise better education for 4,245 black children, 306 F.Supp. 1291. It largely failed to accomplish this purpose. The sad results of that maneuver are described in 306 F.Supp. 1299, 1302; it transferred to "white" schools only 1,315 instead of the promised 4,245 black pupils.

The court also ordered a report on all proposed school construction projects and directed the Board to retain all land it owned in the mid-city area.

On December 1, 1969, the court disapproved the Board's report on construction projects and disapproved generally the desegregation plan then proposed. One of the grounds was that the Board intended to continue to keep 100% black all of the seven all-black elementary schools then remaining in the system, 306 F. Supp. 1299, 1307.

After the Supreme Court had ordered into effect the court's desegregation plan of February 5, 1970, the School Board proposed a "feeder" plan which, among other things, called for the elimination of two black inner-city schools (Double Oaks Elementary and Northwest Junior High), and the reduction of West Charlotte High, the only remaining formerly black high school, to about 60% of capacity. On June 22, 1971, the court found the plan to be characterized by the "abandon[ment of] property in . . wholesale fashion to *preserve* discrimination." 328 F.Supp. 1346, 1352. The plan was disapproved as "regressive and unstable in nature and results," 328 F.Supp. 1346, 1350.

A week later, on June 29, 1971, the court reviewed a further proposed revision for the 1971–72 school year, which largely restored West Charlotte High School and Northwest Junior High, but again proposed the closing of (formerly black) Double Oaks Elementary, on the alleged ground that the school was inaccessible because of its location in a cul-de-sac. The court, however, found that *in fact the Board owned a right of way*, at the time passable, which with a small amount of improvement would solve the access problems, 328 F.Supp. 1346, 1348. It appeared that an underlying concern of the Board was that "white flight" would prevent desegregation of this inner-city school, a rationale which the Supreme Court in *Monroe v. Commissioners*, 391 U.S. 450, 459, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968), had held to be inadequate to overcome constitutional obligation, 328 F.Supp. at 1352.

On October 21, 1971, the court reviewed the School Board's recent actions and noted that decisions about facilities were having an adverse impact on compliance with the Board's constitutional obligations in the pupil assignment area:

> "In addition, several highly specific official actions of the school board itself since the April 1971 decision of the Supreme Court have added new official pressures which tend to restore segregation in certain schools. These are the construction program (use and location of mobile units); the under-population and proposed closing of formerly black schools; and several recent decisions about pupil assignments and transfers. The current plan contemplates use of 232 mobile units. These units, in the main, are located or scheduled for location at suburban schools remote from the black community. Simultaneously, the formerly black schools, with few exceptions, are being operated at considerably less than capacity."

334 F.Supp. 623, 628.

In June 1973, the question of the location and use of school facilities was raised again, this time in the context of proposed plans for the 1973–74 school year. The court approved in large measure the Board's proposal, which, for the first time, substantially breached the insularity of southeast Mecklenburg from the burdens accompanying desegregation. However, it pointed out several "signs of continuing discrimination." One of those signs was the apparent continuation of the attack on the vitality of West Charlotte High School, a modern but formerly all-black school. The proposed plan called for a dramatic increase in facilities at the outlying white schools through the increased use of mobile classrooms, while again reducing the assignments of pupils to West Charlotte and other inner-city and northwest schools. The court found the continuing effort to keep West Charlotte under capacity resulted from its identity as a "black" school and from pressure to close the school as soon as the court would permit. No substantial educational or administrative reason was advanced to support the Board's position. 362 F.Supp. 1222–23. The court summed up "The 'leap-frog' problem" which resulted from a combination of facility location and attendance line-drawing called the "feeder plan":

> ". . . The pupil assignment plan has a fundamental, built-in impediment, which makes all desegregation efforts more difficult and inconvenient than need be. This is the creation, as the first step in desegregation, mostly within the near reaches of the south and east part of the district, of walk-in schools, before dealing with problems of desegregating outlying schools. These walk-in schools tend to absorb the black students who live in the central and south parts of the city. Desegregation of east and southeast white schools and northwest black schools can then be accomplished only by a 'leap-frog' operation, transporting children long distances *across* the center of the city, instead of shorter distances along radii *into* and *out of* the center of the city."

362 F.Supp. at 1236 (emphasis in original).

The 1974 joint proposal of the School Board and the Citizens Advisory Group (CAG) was dated July 9, 1974, filed for approval July 10, 1974, and approved by the court July 30, 1974. It contains the following "Basic Guideline" to govern future decision making on school facilities:

> "XI. *Future Site Selection*: School planning is not to be predicated on population growth trends alone; consideration is to be given to the influence new building can be toward *simplification of an integrated pupil assignment plan. Buildings are to be built where they can readily serve both races.*
>
> "When consideration is being given to the closing of any school, or its conversion to another program, the impact of such action on an integrated school system should be taken into account. *The closing or conversion should not jeopardize the integrated status of the system.*"

School Board Exhibit 3, ¶ 11 at 4 (emphasis added).

On July 11, 1975, the court removed *Swann* from the active docket, while retaining jurisdiction, and noted: "Though continuing problems remain, as hangovers from previous active discrimination, defendants are actively and intelligently addressing these problems without court intervention." D.C., 67 F.R.D. 648, 649.

Martin v. Charlotte-Mecklenburg Bd. of Ed., 475 F. Supp. 1318, at 1329-31 W.D. N. C. 1979).

THE EFFECT THAT CHOICE OF SCHOOL LOCATION HAS UPON THE NECESSITY FOR "BUSSING" IS ILLUSTRATED BY THE SIX NEWEST HIGH SCHOOLS AND TWO OF THE NEWEST JUNIOR HIGH SCHOOLS (SUPPLEMENTAL FINDINGS OF FACT, MARCH 21, 1970, PARAGRAPH 17):

> The defendants submitted information on the number of children who live within 1-1/2 miles of the schools which are to be desegregated by zoning. This information shows that East Mecklenburg, Independence, North Mecklenburg, Olympic, South Mecklenburg and West Mecklenburg high schools, and Quail Hollow and Alexander junior high schools, with total student populations of 12,184, have in the aggregate only 96 students who live within 1-1/2 miles from the schools. Some 12,088 then are eligible for transportation. These same schools among them provide bus transportation for 5,349 students. This information illustrates the importance of the bus as one of the essential elements in the whole plan of operation of the schools. It also shows the wide gap between those entitled to transportation and those who actually claim it. There is no black school in the system which depends very much upon the school bus to get the children to school. The total number of children transported in October, 1969, to schools identifiable as black was 541 out of total population in those black schools of over 17,000. Black schools, including the new black schools, have been located in black areas where busses would be unnecessary. Suburban schools, including the newest ones, have been located far away from black centers, and where they can not be reached by many students without transportation.

9. MAGNET SCHOOLS PROMOTE DESEGREGATION ONLY IF THEY ARE USED FOR THAT PURPOSE.--"Magnet" schools do not attract children unless the children can get to those schools. The only "magnet" school on the boards in Charlotte at the time of the original 1969 Swann decision was the proposed centrally located Megropolitan High School (referred to in Section 8 above). It was abandoned as soon as desegregation was ordered; it would have made desegregation of the high schools easier!

> *Metropolitan High School.*—Supported by impressive recommendations from Engelhart, Engelhart & Leggett, educational consultants, the Board has planned and has two million dollars on hand to build Metropolitan High School at or near the location of present Second Ward High School. In addition to being a school for conventional high school work, it is to be a center for vocational training and special courses in music, the creative and performing arts and other special subjects not practical to offer in all the high schools. Second Ward is now a 99%+ black school in the Brooklyn urban renewal area four or five blocks south of the Court House and City Hall. The First Baptist Church and the School Board itself have buildings underway on adjacent or nearby land. This is near the geographical and traffic center of the city and county, one-half a mile from the central business district, a few blocks from Central Piedmont Community College and within easy travel distance of most of the city. The location and proposed purposes appear ideal.
>
> Plaintiffs' attorneys object to Metropolitan High School. Some present school patrons want the school built. The School Board has announced a stoppage of work on that school pending this decision.
>
> All three groups may be proceeding upon an erroneous assumption—that the school if built will be a black school because the pupil and faculty populations will be governed by freedom of transfer and school zones as presently administered. That assumption should no longer be entertained. Pupils for regular and vocational subjects can travel or be transported to and from this area, in all directions, with greater ease than is true of any other location in the county. The nearest other high schools, Harding, West Charlotte, Garinger, East and Myers Park, form a hollow pentagon six or seven miles on the side surrounding Second Ward. It would be tragic to refrain from building a needed educational facility simply upon the assumption that it has to be an all-black school and therefore either unlawful or unattractive. The School Board is advised to make plans for desegregation of this school along with other schools in the system. With the unrestricted statutory power to assign pupils and provide transportation, the only thing necessary to build Metropolitan High School according to the dreams of its planners is the decision to do so.

300 F.Supp. 1358, 1371 (1969).

10. PAIRING, CLUSTERING AND GROUPING OF SCHOOLS ARE OF LITTLE HELP IN DESEGREGATING SCHOOLS UNLESS THE CHILDREN HAVE TRANSPORTATION TO GET TO THE ASSIGNED SCHOOLS.

11. THE BUS IS THE SAFEST WAY TO GET TO SCHOOL.--Upon the basis of uncontradicted data furnished by the School Board and on the basis of statistics from the National Safety Council, it was found as a fact that travel by school bus is safer than walking or riding in private vehicles, or any other form of transportation for school children. (Supplementary findings of fact of March 21, 1970.) *See*, also, 318 F.Supp. at 794.

12. *VIOLENCE WAS MINIMAL IN CHARLOTTE*.--Desegregation of the schools produced some "disruption" and some violence, but no deaths and few if any permanently disabling injuries and no major damage to property. The transition has been amazingly peaceful and orderly.

13. *STAGGERED HOURS AND THE "DAWN PATROL" WERE NOT CREATED BY "BUSSING" ORDERS*. THEY WERE THE ORDER OF THE DAY LONG BEFORE *SWANN*.

> 34. The schools already operate on staggered schedules. Today, the opening and closing of schools and the class hours of school bus drivers are adjusted to serve the practical requirements of transportation. Plaintiffs' Exhibit 12 shows that the elementary schools already operate on a staggered opening and closing schedule. Some open at 8:00; some at 8:05; some at 8:10; some at 8:15; some at 8:25 and some at 8:30 and 8:45 in the morning, and the schools close for grades one and two at hours including 1:30; 1:35; 2:00; 2:15; 2:30; 2:45; 3:00; 3:05 and 3:10. The court finds that staggered opening and closing hours for elementary schools, and arrangement of class schedules of bus drivers for late arrival and early departure are facts of life which will not be eliminated by desegregation of the schools.

318 F.Supp. 786, 798 (1970).

14. *CHILDREN OF TENDER YEARS HAD LONG BUS TRIPS EVEN WHEN "BUSSING" WAS A TOOL OF SEGREGATION*.--Tears have been shed for children of "tender years" who now have to ride busses. This practice did not start with *Swann*. Before *Swann* when busses were used to preserve rather than eliminate segregation, four and five-year-old children were already riding busses on routes thirty-nine miles long (each way) to public kindergartens in Mecklenburg County!

6. In Charlotte-Mecklenburg approximately 23,300 children in grades one through twelve (plus more than 700 kindergarten children, ages four and five) ride some 280 school busses to school every day. The school bus routes for the four and five year olds vary from seven miles to thirty-nine miles, one way. The average one way bus route in the system today is about an hour and fifteen minutes. Average daily bus travel exceeds forty miles.

318 F. Supp. 786, 794-5 (1970).

32. *Age of children* has apparently never prevented their school bus transportation. There are, of course, more children between kindergarten and the sixth grade than there are in the higher grades when the dropout rate increases, and more elementary children, including first graders, receive transportation than do high schoolers.

318 F. Supp. 786, 797 (1970).

15. "NEIGHBORHOOD" IS NOT A BASIS FOR DENYING CONSTITUTIONAL RIGHTS.--

The "Neighborhood School" Theory. —Recently, the School Board has followed what it calls the "neighborhood school" theory. Efforts have been made to locate elementary schools in neighborhoods, within walking distance of children. The theory has been cited to account for location and population of junior and senior high schools also.

"Neighborhood" in Charlotte tends to be a group of homes generally similar in race and income. Location of schools in Charlotte has followed the local pattern of residential development, including its *de facto* patterns of segregation. With a few significant exceptions, such as Olympic High School (about ⅓ black) and Randolph Road Junior High School (28% black), the schools which have been built recently have been black or almost completely black, or white or almost completely white, and this probability was apparent and predictable when the schools were built. Specific instances include Albemarle Road Elementary (99% + white); Beverly Woods' (100% white); Bruns Avenue (99%+ black); Hidden Valley (100% white); Olde Providence (98% white); Westerly Hills (100% white); Albemarle Road Junior High (93% white).

Today people drive as much as forty or fifty miles to work; five or ten miles to church; several hours to football games; all over the county for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood. Parents with children of all ages may be members of two or three separate and widely scattered school "communities." *Putting a school in a particular location is the active force which creates a temporary community of interest among those who at the moment have children in that school.* The parents' community with the school ordinarily ends the day the youngest child graduates.

If this court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships. The neighborhood school concept may well be invalid for school administrative purposes even without regard for racial problems. The Charlotte-Mecklenburg School Board today, for example, is transporting 23,000 students on school busses. First graders may be the largest group so transported. If a first grader lives far enough from school to ride a bus, the school is not part of his neighborhood.

When racial segregation was required by law, nobody evoked the neighborhood school theory to *permit* black children to attend white schools close to where they lived. The values of the theory somehow were not recognized before 1965. It was repudiated by the 1955 North Carolina General Assembly and still stands repudiated in the Pupil Assignment Act of 1955-56, which is quoted above. The neighborhood school theory has no standing to override the Constitution.

300 F.Supp. 1358, 1369 (1969).

16. NOT ALL SCHOOL CASES ARE ALIKE.--Each school case should be treated on its own merits; a "national" approach which denies equal protection of laws by prohibiting a particular remedy would not seem to help the situation.

This is a local case in a local court—a lawsuit—to test the constitutional rights of local people.—The *principles* which outlaw racial discrimination in public schools certainly are of nationwide application, but the *facts* and results may vary from case to case. This is a local suit involving actions of the State of North Carolina and its local governments and agencies. The facts about the development of black Charlotte may not be the facts of the development of black Chicago or black Denver or New York or Baltimore. Some other court will have to pass on that problem. The decision of the case involves local history, local statutes, local geography, local demography, local state history including half a century of bus transportation, local zoning, local school boards—in other words, local and individual merits.

This court has not ruled, and does not rule that "racial balance" is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*

The orders of this court have been confined to the only area they can properly embrace, and that is *the rights of the particular parties represented in this case, on the particular facts and history of this case.*

E. *The issue is not the validity of a "system," but the rights of individual people.*—If the rights of citizens are infringed by the system, the infringement is not excused because in the abstract the system may appear valid. "Separate but equal" for a long time was thought to be a valid system but when it was finally admitted that individual rights were denied by the valid system, the system gave way to the rights of individuals.

318 F.Supp. 786, 793 (1970).

17. TEMPORARY MAJORITIES ARE NOT ALWAYS RIGHT.--

The Issue Is One Of Constitutional Law—Not Politics.—At the hearings the defendants offered public opinion polls and testimony that parents don't like "bussing," and that this attitude produces an adverse educational effect upon the minds of the children. The court has excluded such evidence, and must continue to proceed unaffected, if possible, by this and other types of political pressure and public opinion.

This is not out of disregard for the opinions of neighbors. A judge would ordinarily like to decide cases to suit his neighbors. Furthermore, as first suggested on August 15, 1969, it may well be that if the people of the community understood the facts, as the court has been required to learn and understand them, they would reach about the same conclusions the court has reached.

To yield to public clamor, however, is to corrupt the judicial process and to turn the effective operation of courts over to political activism and to the temporary local opinion makers. This a court must not do.

In the long run, it is true, a majority of the people will have their way. The majority must be a majority of the pertinent voting group. As our slave-owning grandfathers of the South learned in 1865, the pertinent voting group on constitutional matters includes the people and their elected representatives from the nation at large, not just the South, and not just Mecklenburg County. Methods exist to amend the Constitution. If the Constitution is amended or the higher courts rule so as to allow continued segregation in the local public schools, this court will have to be governed by such amendment or decisions. In the meanwhile, the duty of this and other courts is to seek to follow the Constitution in the light of the existing rulings of the Supreme Court, and under the belief that the constitutional rights of people should not be swept away by temporary local or national public opinion or political manipulation.

Civil rights are seldom threatened except by majorities. One whose actions reflect accepted local opinion seldom needs to call upon the Constitution. It is axiomatic that persons claiming constitutional protection are often, for the time being, out of phase with the accepted "right" thinking of their local community. If in such circumstances courts look to public opinion or to political intervention by any other branch of the government instead of to the more stable bulwarks of the Constitution itself, we lose our government of laws and are back to the government of man, unfettered by law, which our forefathers sought to avoid.

Lord Edward Coke, Chief Justice of the Court of Common Pleas of England, may have summed it up when in 1616 he wrote, responding to a peremptory demand from the King's attorney general, that he must deny the King's request because under his oath his obligation was that he

> "* * * shall not delay any person of common right for the letters of the King or of any person nor for any other cause * * *."

318 F.Supp. 786, 793-4 (1970).

III.

A BRIEF REPORT ON DESEGREGATED CHARLOTTE-MECKLENBURG TODAY.

Attached (Exhibit I) is a copy of a report made last month by Jay M. Robinson, Superintendent of the Charlotte-Mecklenburg Schools, to the House Committee which is considering this same problem. Mr. Robinson, a talented and able administrator, expresses the firm view that the schools in Charlotte-Mecklenburg are getting along well, and that "In large measure we have put racial strife and bigotry behind us and are concentrating on improving the quality of education for all our students."

It is apparent from his report and from other data that

(a) About two-thirds of the 73,000 students ride school busses every day.

(b) About 12,000 are considered as being transported to maintain desegregation.

(c) No significant student disruptions have occurred in any schools in the last six years.

(d) There has been little change in the number of Mecklenburg County students attending non-public schools in the county in the last five years.

(e) Numerous methods in addition to bussing are used to maintain school desegregation. These include pairings, groupings, satellite areas and gerrymandering (re-zoning of attendance areas). (Opening and closing schools, use of mobile units and other methods have previously been noted.)

(f) "Our students' test scores rank well above national averages in all categories tested. The past two years is the only time our test scores have been above national averages since we began using standardized testing in 1967."

Several charts (Exhibits A through H) are attached showing progress which has been made in the achievement of students in the Charlotte-Mecklenburg system. During a decade when test scores across the nation have been falling, Charlotte-Mecklenburg achievement test scores are rising. For example, black sixth graders who were reading at third and fourth grade levels in 1968 are now reading at almost sixth grade level across the board, and sixth grade black math students are now performing computations at seventh grade level.

The overall cost of transportation (of which one-fourth or less may be for purpose of desegregation) has gone up from a little over 3% of the school budget in 1970 to 3.77% in 1980-81. The transportation system is much more tailor-made and specialized than it was in 1970. It would still appear that the annual cost of bussing for desegregation, just as in 1970, is still less than 1% of the cost of school operation, and less than the cost of operating the schools for two days.

As to student enrollment and "white flight", chart H is enlightening It shows that with the rise and fall of the birth rate the overall school population of the county has fluctuated, but that after 1975 there has been no significant increase in the numbers of local children attending private schools and no great change in black-white proportions of students in public schools.

CONCLUSION

1. "Bussing" is working in Charlotte-Mecklenburg.

2. Bussing is often an indispensable part of the remedy for unconstitutionally segregated schools.

3. Choice of remedies by a court of equity for constitutional violation is an ad hoc, local, individual matter, varying with the facts of each case.

4. I hope the information in this paper will aid in the Senate's consideration of the propriety and the constitutionality of any statute which, if constitutional rights are violated, would prevent or limit the use by a court of justice of available remedies.

Respectfully submitted.

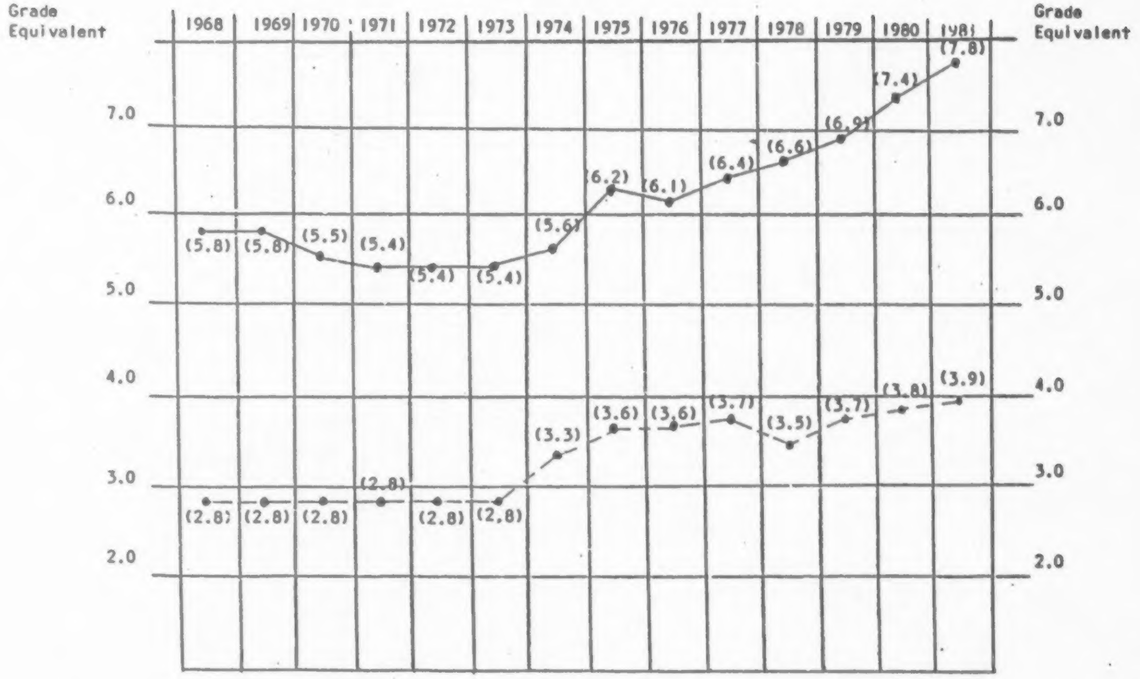
James B. McMillan

James B. McMillan

October 16, 1981

Chart A

CHARLOTTE-MECKLENBURG SCHOOLS
Longitudinal Report of Achievement Test Data
READING COMPREHENSION
Grades 3 and 6

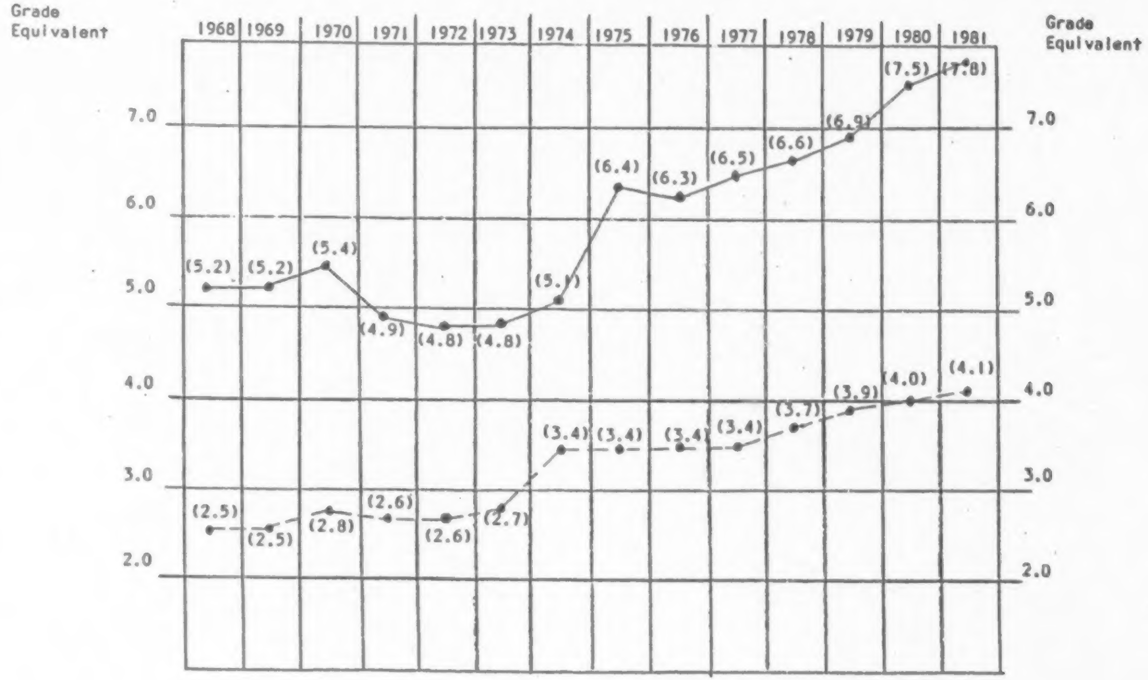


Pupil Assessment
September 1981

Code: 3rd Grade --------- National Norm 3.7
6th Grade _______ National Norm 6.7

Chart B

CHARLOTTE-MECKLENBURG SCHOOLS
Longitudinal Report of Achievement Test Data
MATH COMPUTATION
Grades 3 and 6



Pupil Assessment
September 1981

Code: 3rd Grade --------- National Norm 3.7
6th Grade ________ National Norm 6.7

Chart C

CALIFORNIA ACHIEVEMENT TEST RESULTS

CHARLOTTE-MECKLENBURG SCHOOLS

GRADE	TEST YEAR*	GRADE EQUIVALENT**					PERCENTILE***				
		READ.	MATH	LANG.	SPELL.	TOTAL	READ.	MATH	LANG.	SPELL.	TOTAL
3	77/78	3.5	3.6	3.5	3.8	3.6	43	46	45	53	45
	78/79	3.7	3.8	4.0	3.9	3.8	50	54	57	56	54
	79/80	3.8	4.0	4.3	4.3	3.9	54	61	65	63	60
	80/81	3.9	4.1	4.4	4.5	4.1	56	64	66	65	62
6	77/78	6.5	6.6	6.7	7.1	6.5	47	48	50	54	47
	78/79	6.7	6.9	7.3	8.5	6.8	50	53	56	57	52
	79/80	7.1	7.4	8.0	8.5	7.3	56	62	64	61	60
	80/81	7.4	7.7	8.3	8.5	7.6	59	67	69	65	65
9	77/78	9.0	9.0	9.2	N/A	9.0	46	44	46	56	45
	78/79	9.4	9.5	9.8	N/A	9.5	48	49	51	56	49
	79/80	10.0	10.0	10.5	N/A	10.0	52	55	57	60	55
	80/81	10.0	10.6	10.9	N/A	10.4	55	60	62	64	59

*The first California Achievement Tests were administered during the 1977/78 school year.

**The national average grade equivalents are 3.7, 6.7 and 9.7 for the third, sixth and ninth grades respectively.

***The national average percentile is 50.

Chart D

ACHIEVEMENT TEST GRADE EQUIVALENT RESULTS

CHARLOTTE-MECKLENBURG SCHOOLS
THIRD GRADE

TEST YEAR	TEST	READING COMPREHENSION			MATH COMPUTATION		
		BLACK	WHITE	TOTAL	BLACK	WHITE	TOTAL
66/67							
67/68	SAT*			2.8			2.5
68/69	SAT*			2.8			2.5
69/70	SAT*			2.8			2.8
70/71	SAT*			2.8			2.6
71/72	SAT*			2.8			2.6
72/73	SAT*			2.8			2.7
73/74	SAT*			3.3			3.4
74/75	SAT*			3.6			3.4
75/76	SAT*			3.6			3.4
76/77	SAT*			3.7			3.4
77/78	CAT**	2.5	4.0	3.5	3.4	3.9	3.7
78/79	CAT**	2.8	4.2	3.7	3.5	4.1	3.9
79/80	CAT**	3.1	4.2	3.8	3.7	4.3	4.0
80/81	CAT**	3.3	4.3	3.9	3.9	4.4	4.1

The National Average Grade Equivalent is 3.7.

*SAT refers to the Standard Achievement Test.

**CAT refers to the California Achievement Test.

Chart E

CHARLOTTE-MECKLENBURG SCHOOLS
1980 ACHIEVEMENT TEST RESULTS
Grades 3, 6, 9

	Third Grade			Sixth Grade			Ninth Grade		
	This System	Nation	State	This System	Nation	State	This System	Nation	State
Reading									
Grade Equivalent	3.8	3.7	3.7	7.1	6.7	6.7	10.0	9.7	9.3
Percentile Rank	54	50	51	56	50	50	52	50	48
Mathematics									
Grade Equivalent	4.0	3.7	3.9	7.4	6.7	6.9	10.0	9.7	9.4
Percentile Rank	61	50	56	62	50	54	55	50	48
Language									
Grade Equivalent	4.3	3.7	4.1	8.0	6.7	7.4	10.5	9.7	10.0
Percentile Rank	63	50	60	64	50	58	57	50	52
Spelling									
Grade Equivalent	4.3	3.7	4.2	8.5	6.7	8.5	N/A	N/A	N/A
Percentile Rank	63	50	61	61	50	60	60	50	56
Total Battery									
Grade Equivalent	3.9	3.7	3.8	7.3	6.7	6.9	10.0	9.7	9.5
Percentile Rank	60	50	55	60	50	54	55	50	49

Percentiles are derived from distributions of individual scores rather than distributions of group averages.

Chart F

PRESCRIPTIVE READING AND DIAGNOSTIC MATH INVENTORIES

CHARLOTTE-MECKLENBURG SCHOOLS

		GRADE EQUIVALENT**						PERCENTILE***					
	TEST	READING			MATH			READING			MATH		
GRADE	YEAR*	B	W	TOTAL	B	W	TOTAL	B	W	TOTAL	B	W	TOTAL
1	77/78	1.5	1.9	1.8	1.7	2.3	2.1	35	67	54	54	82	73
	78/79	1.6	2.1	1.8	2.0	2.5	2.3	42	74	61	69	90	83
	79/80	1.6	2.0	1.8	1.9	2.4	2.2	42	70	59	65	87	80
	80/81	1.6	2.1	1.8	2.1	2.5	2.3	45	73	61	71	90	84
2	77/78	2.2	3.3	2.9	2.5	3.4	3.2	34	67	55	39	78	65
	78/79	2.4	3.5	3.0	2.9	3.6	3.4	39	71	59	55	87	77
	79/80	2.4	3.6	3.1	3.0	3.6	3.4	40	75	61	60	87	78
	80/81	2.6	3.8	3.4	3.3	3.7	3.5	48	81	69	69	91	84

*The first inventories were administered during the 1977/78 school year.

**The national average grade equivalents are 1.7 and 2.7 for the first and second grades respectively.

***The national average percentile is 50.

Note: "B" refers to black student inventory results and "W" refers to white student inventory results.

Chart G

ACHIEVEMENT LEVELS ESTIMATED FROM READING AND MATHEMATICS CRITERION-REFERENCED TESTS FOR FIRST AND SECOND GRADE STUDENTS IN THE CHARLOTTE-MECKLENBURG SCHOOL SYSTEM, IN THE NATION, AND IN THE STATE

1980

	First Grade			Second Grade		
	This System	Nation	State	This System	Nation	State
Reading						
Grade Equivalent	1.8	1.7	1.8	3.1	2.7	3.1
Percentile Rank	59	50	54	61	50	60
Mathematics						
Grade Equivalent	2.2	1.7	2.2	3.4	2.7	3.3
Percentile Rank	80	50	77	78	50	74

Pupil Assessment
July 1980

Chart II

STUDENT ENROLLMENT

CHARLOTTE-MECKLENBURG SCHOOLS
1966/67 through 1980/81

YEAR	TOTAL	% BLACK	N-Public Schools Est. Enr.
66/67	76,889	28%	2900
67/68	79,696	28%	2950
68/69*	82,000(est.)	28%	3000
69/70	84,518	29%	2900
70/71	82,507	30%	5800
71/72	81,042	31%	6500
72/73	79,873	32%	6900
73/74	78,626	33%	7300
74/75	77,805	34%	7700
75/76	78,257	35%	8000
76/77	80,507	36%	8050
77/78	79,465	36%	8250
78/79	77,609	37%	8400
79/80	76,305	37%	8650
80/81	74,149	38%	8850
81-82	72 940	38%	–

*In 1969 the schools' consultant, based on then current information, predicted a 1974-75 enrollment of 91,000.

STATEMENT TO UNITED STATES HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE

by

Jay M. Robinson

The Charlotte-Mecklenburg School System is the 30th largest system in the United States with 73,000 students in grades K-12. Of the students 61 percent are white and 39 percent are black. The school system has 105 schools, 74 elementary, 21 junior high, and 10 senior highs. The black ratio of each school ranges from 20 to 50 percent with one exception. One elementary school was exempted from the court order. That school is located in a community that was becoming integrated and the school racial ratio has continued to increase to its present 90 percent black student enrollment.

The school system provides school bus transportation for all eligible students. The North Carolina State Board of Education establishes the regulations which determine student eligibility to ride a school bus. The school system operates 621 buses daily that travel a total of 37,000 miles at an approximate cost of $4,000,000 annually. Approximately 48,000 students are transported to and from school each day by bus and approximately one-fourth of the 48,000 are bused as a result of their school assignment being made for the purpose of racial balance.

Prior to the implementation of the Swann decision in 1970 there was only token integration in the Charlotte-Mecklenburg Schools. The major reason being that over 90 percent of the black students lived in the inner-city in an area that is less than 10 percent of the geographic area of the county. Approximately 5 percent of the students in Mecklenburg County attended non-public schools before 1970 and approximately 12 percent attend non-public schools today. There has been little change in the number of Mecklenburg County students attending non-public schools in the county in the last five years.

The school system's pupil assignment plan uses three methods to correct racial imbalance: pairings of elementary schools, designation of satellite areas for assignment to a school in another attendance area, and gerrymandering of attendance area lines. The assignment plan was modified in 1974, 1978, 1979, and 1981 for three reasons: to correct racial imbalances, to better utilize existing school buildings, or to create a neighbor school when a community became integrated.

In the first few years after 1970 the schools were in turmoil. Achievement test scores dropped, student riots were commonplace, attendance was poor, and community support was very weak. By 1975 things had settled down and achievement scores began to improve and no significant student disruptions have occurred in any schools in the last six years. Student attendance has improved substantially for each of the last three years. Student behavior is also much improved. Parent and community support is very strong today with school events, such as PTA meetings and athletic events, enjoying record attendance. Achievement test scores compare much more favorably with other school systems than ever before. Our students' test scores rank well above national averages in all categories tested. The past two years is the only time our test scores have been above national averages since we began using standardized testing in 1967.

The Chamber of Commerce considers the school system a very positive factor in recruiting new business and industry to our community. We recently passed a $28,000,000 school facility bond referendum by a vote of better than 2 to 1. Our schools are financially dependent upon the locally elected Board of County Commissioners. We have received good local financial support and for the current school year we have been given a $4,000,000 increase in our operating budget.

Race relations are excellent in our community. Our nine school board members are all elected at large in a county-wide election. Three of the nine members of the board are black, one being chairman, even though only 25 percent of the county population is black. No incumbent board members have been defeated in the last three elections.

In my opinion, school integration has significantly contributed to the good race relations and quality of life in Charlotte and Mecklenburg County. Bussing children from their neighborhoods to schools in other areas of the county in order to improve racial balance in schools will probably always bring strong opposition. However, I know of no other workable way to integrate schools until neighborhoods become more integrated. I believe our community is a better place to live and the overall quality of our schools is better today than it would have been if the Swann decision had never been made. Court ordered bussing is the only way all schools in our school system would have been integrated. There has been a tremendous effort made by our community to make our pupil assignment plan work. Although resistance to cross bussing continues in Charlotte, there is also a sense of pride in how well we have handled the difficult task. This past spring a testimonial dinner honoring the federal judge and the attorney for the plaintiff in the Swann case was held in Charlotte. The demand for tickets to this occasion was much greater than the large hall where the dinner was held could accommodate. The school board cancelled their regularly scheduled meeting in order for school board members to be able to attend this dinner. A decade ago the Board of Education had tenaciously fought the Swann decision and had resisted initial implementation of the decision.

There is an air of optimism in the Charlotte-Mecklenburg Schools. Morale and expectations are high. I would prefer being superintendent in Charlotte-Mecklenburg to any large school system in this country. The major reason I feel this way is that I sincerely believe we have successfully handled the problems of school integration. In large measure we have put racial strife and bigotry behind us and are concentrating on improving the quality of education for all our students.

EXCERPTS FROM GENERAL STATUTES OF NORTH CAROLINA

804 318 FEDERAL SUPPLEMENT

APPENDIX

CONSTITUTION OF NORTH CAROLINA Art. XIV, § 8

§ 8. Intermarriage of whites and negroes prohibited.—All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation, inclusive, are hereby forever prohibited. (Convention 1875.)

ARTICLE IX

EDUCATION

§ 1. Education shall be encouraged.—Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. (Const. 1868.)

§ 2. General Assembly shall provide for schools; separation of the races.—The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race. (Const. 1868; Convention 1875.)

GENERAL STATUTES OF NORTH CAROLINA

§ 14-181. Miscegenation.—All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or State's prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court. (Const., art. 14, s. 8; 1834, c. 24; 1838-9, c. 24; R. C., c. 68, s. 7; Code, s. 1084; Rev., s. 3369; C. S., s. 4340.)

§ 14-182. Issuing license for marriage between white person and negro; performing marriage ceremony. — If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor. (1830, c. 4, s. 2; R. C., c. 34, s. 80; Code, s. 1085; Rev., s. 3370; C. S., s. 4341.)

§ 51-3. Want of capacity; void and voidable marriages.—All marriages between a white person and a negro or between a white person and person of negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a negro, or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: Provided, double first cousins may not marry; and provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or of negro descent to the third generation, inclusive, and for bigamy; provided further, that no marriage by persons either of whom may be under

under sixteen years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within forty-five (45) days of the marriage which separation has been continuous for a period of one year shall be voidable: Provided, that no child shall have been born to the parties within ten (10) lunar months of the date of separation. (R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; Code, s. 1810; 1887, c. 245; Rev., s. 2083; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135; C. S., 2495; 1947, c. 383, s. 3; 1949, c. 1022; 1953, c. 1105; 1961, c. 367.)

§ 51-16. Form of license.—License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for........county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged ......years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged......years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within sixty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this .... day of ...., 19.. L. M.,
Register of Deeds of......County

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored" or "indian," as the case may be. The certificate shall be filled up, and signed by the minister or officer celebrating the marriage, and also be signed by one or more witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N. O., an ordained or authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the ...... day of ...., 19....., at the house of P. R., in (here name the town, if any, the township and county), according to law.

Witness present at the marriage: ......N. O.
S. T., of (here give residence). (Rev., [illegible]; Code, s. 1818; 1889, c. [illegible], ss. 1, 2; 1871-2, c. 193, s. 8; 1905, c. 791, s. 2; 1917, c. 38; C. S. [illegible].)

Local Modification.—[illegible]: 1911, c. 98.

§ 58-225. Maintenance of separate branches, when operated for benefit of both races.—All burial associations now operating in the state of North Carolina and all burial associations hereafter organized and operated in the state of North Carolina, for the benefit of both races, shall maintain and operate two separate branches, and the provisions of article 34 shall apply to each branch as a separate association, except as hereinafter provided. (1911, c. 130, s. 2.)

§ 58-267. Meetings of governing body; principal office; separation of races.—Any such society or order incorporated and organized under the laws of this State may provide for the meeting of its supreme legislative or governing body in any other state, province, or territory wherein such society has subordinate lodges, and all business transacted at such meetings is as valid in all respects as if the meetings were held in this State; but the principal business office of such society shall always be kept in this State. No fraternal order or society or beneficiary association shall be authorized to do business in this State under the provisions of this article, whether incorporated under the laws of this or any other state, province, or territory, which associates with, or seeks in this State to associate with, as members of the same lodge, fraternity, society, association, the white and colored races with the objects and purposes provided in this article. (1899, c. 54, s. 91; Rev., s. 4797; 1913, c. 46; C. S., s. 6494.)

§ 60-94. Separate accommodations for different races.—All railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire, other than street railways, shall provide separate but equal accommodations for the white and colored races at passenger stations or waiting-rooms, and also on all trains and steamboats carrying passengers. Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars, which shall be provided by the railroads under the supervision and direction of the utilities commission: *Provided*, that this shall not apply to relief trains in cases of accident, to Pullman or sleeping cars, or through express trains that do not stop at all stations and are not used ordinarily for traveling from station to station, to negro servants in attendance on their employers, to officers or guards transporting prisoners, nor to prisoners so transported. (Rev., s. 2619; 1899, c. 384; 1901, c. 213; 1933, c. 134, s. 8; 1941, c. 97, s. 8; C. S. 3494.)

§ 60-95. Certain carriers may be exempted from requirement.—The utilities commission is hereby authorized to exempt from the provisions of § 60-94 steamboats, branch lines and narrow-gauge railroads and mixed trains carrying both freight and passengers, if in its judgment the reforcement of the same be unnecessary to secure the comfort of passengers by reason of the light volume of passenger traffic, or the small number of colored passenger travelers on such steamboats, narrow-guage railroads, branch lines or mixed trains. (Rev., s. 2620; 1899, c. 384, s. 2; 1901, c. 213; 1933, c. 134, s. 8; 1941, c. 97, s. 8; C. S. 3495.)

§ 60-96. Use of same coach in emergencies.—When any coach or compartment car for either race shall be completely filled at a station where no extra coach or car can be had, and the increased number of passengers could not be foreseen, the conductor in charge of such train may assign and set apart a portion of a car or compartment assigned for passengers of one race to passengers of the other race. (Rev., s. 2621; 1899, c. 384, s. 3; C. S. 3496.)

§ 60-97. Penalty for failing to provide separate coaches.—Any railroad or steamboat company failing to comply in good faith with the provisions of §§ 60-94 to 60-96 shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger on any train or boat of any railroad or steamboat company which is required by this chapter to furnish separate accommodations to the races, who has been furnished accommodations on such railroad train or steamboat only in a car or compartment with a person of a different race in violation of law. (Rev., s. 2622; 1899, c. 384, s. 3; C. S. 3497.)

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§ 60-98 CH. 60. RAILROADS

§ 60-98. Exceptions to requirement of separate coaches and toilets.—As to trains consisting of not more than one passenger car unit, operated principally for the accommodation of local travel, although operated both intrastate and interstate and irrespective of the motive power used, the utilities commission is authorized to make such rules and regulations for the separation of the races and with regard to toilet facilities as in its judgment may be feasible and reasonable in the circumstances, and the rules and regulations established pursuant to this authority shall be exceptions to the provisions of §§ 60-94 and 60-107. (1933, c. 270; 1941, c. 97, s. 8.)

§ 60-135. Separate accommodations for different races; failure to provide misdemeanor.—All street interurban and suburban railway companies, engaged as common carriers in the transportation of passengers for hire in the state of North Carolina, shall provide and set apart so much of the front portion of each car operated by them as shall be necessary, for occupation by the white passengers therein, and shall likewise provide and set apart so much of the rear part of such car as shall be necessary, for occupation by the colored passengers therein, and shall require as far as practicable the white and colored passengers to occupy the respective parts of such car so set apart for each of them. The provisions of this section shall not apply to nurses or attendants of children or of the sick or infirm of a different race, while in attendance upon such children or such sick or infirm persons. Any officer, agent or other employee of any street railway company who shall willfully violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1907, c. 850, ss. 1, 6, 7; 1909, c. 881; C. S. 3536.)

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§ 62-44. To provide for separate waiting rooms for races.—The commission is empowered and directed to require the establishment of separate waiting rooms at all stations for the white and colored races. (Rev., s. 1097; 1899, c. 61, s. 2, [illegible] 14; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1043.)

§ 62-109. Regulatory powers of commission; separation of races.—The commission is hereby vested with power and authority to supervise and regulate every motor vehicle carrier under this article; to make or approve the rates, fares, charges, classifications, rules and regulations for service and safety of operation and the checking of baggage of each such motor vehicle carrier; to supervise the operation of union passenger stations in any manner necessary to promote harmony among the operators and efficiency of service to the traveling public; to fix and prescribe the speed limit, which may be less but shall not be greater than that prescribed by law; to regulate the accounts and to require the filing of annual and other reports and of other data by such motor vehicle carriers; to require the increase of equipment capacity to meet public convenience and necessity; and to supervise and regulate motor vehicle carriers in all other matters affecting the relationship between such carriers and the traveling and shipping public. The commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all motor vehicle carriers, and the said commission is authorized, directed and empowered, whenever the public convenience and necessity may require, to increase, or decrease, or suspend temporarily the service upon any route for which a franchise certificate has been issued; and is hereby authorized, empowered, and directed to see that such rules and regulations and all, and singularly, the provisions of this article are enforced. The commission shall require any motor vehicle carrier operating on a franchise granted by the utilities commission and coming within the provisions of this article, if engaged in the transportation of both white and colored passengers for hire, to provide separate but equal accommodations for the white and colored races at passenger stations or waiting rooms where the carrier receives passengers of both races and/or on all busses or motor vehicles operating on a route or routes over which such carrier transports passengers of both races. Such accommodations may be furnished either by separate motor vehicles or by equal accommodations in motor vehicles. Provided that any requirement as to separate accommodation for the races shall not apply to specially chartered motor vehicles or to negro servants and attendants on their employers, or to officers or guards transporting prisoners; and provided that operators of motor vehicles or bus lines or taxicabs engaged in the transportation of passengers of one race only shall not be required to provide any accommodations for the other race, and provided that an operator shall not be required to furnish any accommodations to the other race over a line or route where he has undertaken and is engaged in the transportation of passengers of only one race, and provided, further, that nothing contained in this section shall be construed to declare operators of busses and/or taxicabs common carriers. (1923, c. 30, s. 4; 1927, c. 136, s. 7; 1929, c. 216, s. 1; 1933, c. 134, s. 8; 1941, c. 97.)

§ 65-38. Racial restrictions as to use of cemeteries for burial of dead.—In the event said property has been heretofore used exclusively for the burial of members of the negro race, then said cemetery or burial ground so established shall remain and be established as a burial ground for the negro race. In the event said property has been heretofore used exclusively for the burial of members of the white race, then said cemetery or burial ground so established shall remain and be established as a burial ground for the white race. (1947, c. 821, s. 2.)

§ 71-1. Cherokee Indians of Robeson County; rights and privileges.—The persons residing in Robeson, Richmond, and Sampson counties who have heretofore been known as "Croatan Indians" or "Indians of Robeson County," together with their descendants, shall hereafter be known and designated as "Cherokee Indians of Robeson County," and by that name shall be entitled to all the rights and privileges heretofore or hereafter conferred, by any law or laws of the state of North Carolina, upon the indians heretofore known as the "Croatan Indians" or "Indians of Robeson County." In all laws enacted by the General Assembly of North Carolina relating to said indians subsequent to the enactment of said chapter fifty-one of the Laws of eighteen hundred and eighty-five, the words "Croatan Indians" and "Indians of Robeson County" are stricken out and the words "Cherokee Indians of Robeson County" inserted in lieu thereof. (Rev., s. 4168; 1905, c. 31, s. 2; 1911, c. 215; P. L. 1911, c. 263; 1913, c. 123; C. S. 5387.)

§ 71-2. Separate privileges in schools and institutions.—Such Cherokee indians of Robeson County and the indians of Person county, defined in the chapter Education, § 115-66, shall be entitled to the following rights and privileges:

Separate schools with the educational privileges provided in the chapter Education.

Suitable accommodations in the state hospital for the insane at Raleigh, as provided in the chapter Hospitals for the Insane, in the article entitled Organization and Management.

3. The sheriffs, jailers, or other properties of Robeson and Person counties shall provide in the common jails of said counties, and in the homes for the aged and infirm thereof, separate cells, wards, or apartments for such indians in all cases where it shall be necessary under the laws of this state to commit any of said indians to such jails or county homes. (1911, c. 215, s. 6; 1913, c. 123; P. L. 1913, c. 22; C. S. 5388.)

§ 90-212. What bodies to be furnished.—All officers, agents or servants of the State of North Carolina, or of any county or town in said State, and all undertakers doing business within the State, having charge or control of a dead body required to be buried at public expense, or at the expense of any institution supported by State, county or town funds, shall be and hereby are required immediately to notify, and, upon the request of said Board or its authorized agent or agents, without fee or reward, deliver, at the end of a period not to exceed thirty-six hours after death, such body into the custody of the Board, and permit the Board or its agent or agents to take and remove all such bodies or otherwise dispose of them: Provided, that such body be not claimed within thirty-six hours after death to be disposed of without expense to the State, county or town, by any relative within the second degree of consanguinity, or by the husband or wife of such deceased person: Provided, further, that the thirty-six hour limit may be prolonged in cases within the jurisdiction of the coroner where retention for a longer time may be necessary: Provided, further, that the bodies of all such white prisoners dying while in Central Prison or road camps of Wake County, whether death results from natural causes or otherwise, shall be equally distributed among the white funeral homes in Raleigh, and the bodies of all such negro prisoners dying under similar conditions shall be equally distributed among the negro funeral homes in Raleigh; but only such funeral homes can qualify hereunder as at all times maintain a regular licensed embalmer: Provided, further, that nothing herein shall require the delivery of bodies of such prisoners to funeral directors of Wake County where the same are claimed by relatives or friends.

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Art. 6. Separate Toilets for Sexes and Races.

§ 95-48. When separate toilets required; penalty.—All persons and corporations employing males and females in any manufacturing industry, or other business employing more than two males and females in towns and cities having a population of one thousand persons or more, and where such employees are required to do indoor work chiefly, shall provide and keep in a cleanly condition separate and distinct toilet rooms for such employees, said toilets to be lettered and marked in a distinct manner, so as to furnish separate facilities for white males, white females, colored males and colored females: Provided, that the provisions of this section shall not apply to cases where toilet arrangements or facilities are furnished by said employer off the premises occupied by him. (1913, c. 83, s. 1; C. S. 6559.)

§ 95-49. Location; intruding on toilets misdemeanor.—It shall be the duty of the persons or corporations mentioned under this article to locate their toilets for males and females, white and colored in separate parts of their buildings or grounds in buildings hereafter erected, and in those now erected all closets shall be separated by substantial walls of brick or timber, and any employee who shall wilfully intrude upon or use any toilet not intended for his or her sex or color shall be guilty of a misdemeanor and upon conviction shall be fined five dollars. (1913, c. 83, s. 4; C. S. 6560.)

§ 95-50. Punishment for violation of article.—If any person, firm, or corporation refuses to comply with the provisions of this article, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 83, s. 3; 1919, c. 100, s. 13; C. S. 6561.)

§ 105-323. Making up the tax records.—(a) The list takers for their respective townships, or such other persons as the commissioners may designate, shall make out, on forms approved by the State Board of Assessment, tax records which may consist of a scroll designed primarily to show tax valuations and a tax book designed primarily to show the amount of taxes or may consist of one record designated to show both valuations and taxes. Such records for each township shall be divided into four parts:

(1) White individual taxpayers (including lists filed by corporate fiduciaries for white individual beneficiaries);

(2) Colored individual taxpayers (including lists filed by corporate fiduciaries for colored individual beneficiaries);

(3) Indian individual taxpayers (including lists filed by corporate fiduciaries for Indian individual beneficiaries); and

(4) Corporations, partnerships, business firms and unincorporated associations.

Reports to the State Board of Assessment and Local Government Commission.

§ 105-335. Report of valuation and taxes.—The clerk of the board of county commissioners, auditor, tax supervisor, tax clerk, county accountant or other officer performing such duties shall, at such time as the board may prescribe, return to the State Board of Assessment on forms prescribed by said Board an abstract of the real and personal property of the county, showing the number of acres of land and their value, the number of town lots and their value, the value of the several classes of livestock, the number of white and negro polls, separately, and specify every other subject of taxation and the amount of county tax payable on each subject and the amount payable on the whole. At the same time said clerk, auditor, supervisor or other officer shall return to the State Board of Assessment an abstract or list of the poll, county and school taxes payable in the county, setting forth separately the tax levied on each poll and on each hundred dollars' value of real and personal property for each purpose, and also the gross amount of every kind levied for county purposes, and such other and further information as the State Board of Assessment may require. (1939, c. 310, s. 1300; 1963, c. 784, s. 2.)

SUBCHAPTER I. THE PUBLIC SCHOOL SYSTEM.

Art. 1. Interpretations.

§ 115-1. A general and uniform system of schools.—A general and uniform system of public schools shall be provided throughout the state, wherein tuition shall be free of charge to all children of the state between the ages of six and twenty-one years. The length of term of each school shall be as authorized by the provisions of the School Machinery Act; however, unless the term is suspended as provided by § 115-331 the term shall not be less than eight months or one hundred and sixty days.

Every man or woman twenty-one years of age or over who has not completed a standard high school course of study, or who desires to study the vocational subjects taught in such school, shall be given equal privileges with every other student in school. (1923, c. 136, s. 1; 1939, c. 358, s. 4; C. S. 5382.)

§ 115-2. Separation of races.—The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race. All white children shall be taught in the public schools provided for the white race, and all colored children shall be taught in the public schools provided for the colored race; but no child with negro blood, or what is generally known as Croatan Indian blood, in his veins, shall attend a school for the white race, and no such child shall be considered a white child. The descendants of the Croatan Indians, now living in Robeson, Sampson, and Richmond counties, shall have separate schools for their children. (1923, c. 136, s. 1; C. S. 5384.)

§ 115-3. Schools provided for both races; taxes.—When the school officials are providing schools for one race it shall be a misdemeanor for the officials to fail to provide schools for the other races, and it shall be illegal to levy taxes on the property and polls of one race for schools in a district without levying it on all property and polls for all races within said district. (1923, c. 136, s. 1; C. S. 5385.)

§ 115-66. Board shall provide schools for Indians in certain counties.—It shall be the duty of the county board of education to provide separate schools for Indians as follows:

The persons residing in Robeson and Richmond counties, supposed to be descendants of a friendly tribe once residing in the eastern portion of the state, known as Croatan Indians, and who have heretofore been known as "Croatan Indians," or "Indians of Robeson County," and their descendants, shall be known and designated as the "Cherokee Indians of Robeson County"; and the persons residing in Person county supposed to be descendants of a friendly tribe of Indians and "White's Lost Colony," once residing in the eastern portion of this state, and known as "Cubans," and their descendants, shall be known and designated as the "Indians of Person County."

The Indians mentioned above and their descendants shall have separate schools for their children, school committees of their own race and color, and shall be allowed to select teachers of their own choice, subject to the same rules and regulations as are applicable to all teachers in the general school law, and there shall be excluded from such separate schools all children of the negro race to the fourth generation. The County Superintendent in and for Robeson County shall keep in his office a record of schools for the Cherokee Indians of Robeson County, which said record shall disclose the operation of such schools, separate and apart from the record of the operation of schools for the other races. (1923, c. 136, s. 42; 1931, c. 141; C. S. 5443.)

ARTICLE 35.

Education Expense Grants.

§ 115-274. Statement of legislative policy and purposes.—The General Assembly of North Carolina recognizes and hereby affirms that knowledge, morality, and adherence to fundamental principles of individual freedom and responsibility are necessary to good government and the happiness of mankind; and further affirms that schools and the means of education ought forever to be encouraged. The value and importance of our public schools are known and acknowledged by our people. It is further recognized that our public schools are so intimately related to the customs and feelings of the people of each community that their effective operation is impossible except in conformity with community attitudes. Our people need to be assured that no child will be forced to attend a school with children of another race in order to get an education. It is the purpose of the State of North Carolina to make available, under the conditions and qualifications set out in this article, education expense grants for the private education of any child of any race residing in this State. In so doing, it is the hope of the General Assembly of North Carolina that all peoples within our State

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shall respect deeply-felt convictions, and that out public school system shall be continually strengthened and improved, and sustained by the support of all our citizens. (1956, Ex. Sess., c. 3.)

Editor's Note.— For article on North Carolina school legislation, 1956, see 35 N.C.L. Rev. 1 (1956).

§ 115-275. Who may apply for State grants; when available; nonsectarian school defined.—Every child residing in this State for whom no public school is available, or who is assigned to a public school attended by a child of another race against the wishes of his parent or guardian or the person standing in loco parentis to such child, is entitled to apply for an education expense grant from State funds appropriated for that purpose. Such grants shall be available only for education in a private nonsectarian school, and in the case of a child assigned to a public school attended by a child of another race, shall, in addition, be available only when it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race. For purposes of this article, a nonsectarian school is defined as a school whose operation is not controlled directly or indirectly by any church or sectarian body or by any

§ 115-278. When applications to be approved.—Application for an education expense grant shall be approved if the board of education to whom application is made finds that:

(1) The child for whom application is made resides within the administrative unit; and

(2) There is no public school available for such child, or such child is now assigned against the wishes of his parent or guardian or of the person standing in loco parentis to such child to a public school attended by a child of another race and it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race; and

(3) Such child is enrolled in or has been accepted for enrollment in a private nonsectarian school, recognized and approved under article 32 of this chapter. (1956, Ex. Sess., c. 3.)

§ 115-323. President, executive committee, and other officials; election, terms, and salaries.—The board of directors shall organize by electing one of its number president and three an executive committee. The terms of office in each case shall be for two years. The board shall elect a superintendent, who shall be ex officio secretary of the board, and whose term of office shall be for three years; also a steward and a physician whose terms of office shall be for two years; and such officers, agents, and teachers as shall be deemed necessary. The compensation for officers and agents and teachers, mentioned in this section, shall be fixed by the board, and shall not be increased nor reduced during their term of service. The board shall have power to erect any buildings necessary, make improvements, and in general do all matters and things which may be beneficial to the good government of the institution, and to this end may make bylaws for the government of the same. The board of directors may term the head teacher of the white department "principal," and the chief officer of the colored department "principal of the colored department." (1881, c. 211, s. 3; Code, § 2229; Rev., s. 4189; 1917, c. 35, ss. 1, 2; C. S., s. 5874; 1963, c. 448, s. 28.)

§ 115-325. Admission of pupils; how admission obtained.—The board of directors shall, on application receive in the institution for the purpose of education, in the main department, all white blind children, and in the department for colored all colored deaf-mutes and blind children, residents of this State, not of confirmed immoral character, nor imbecile, nor unsound in mind, nor incapacitated by physical infirmity for useful instruction, who are between the ages of seven and twenty-one years: Provided, that pupils may be admitted to said institution who are not within the age limits above set forth, in cases in which the board of directors find that the admission of such pupils will be beneficial to them and in cases in which there is sufficient space available for their admission in said institution: Provided, further, that the board of directors is authorized to make expenditures, out of any scholarship funds or other funds already available or appropriated, of sums of money for the use of out of State facilities for any student who, because of peculiar conditions of race or disability, cannot be properly educated at the School in Raleigh. (1881, c. 211, s. 5; Code, s. 2231; Rev., s. 4191; 1917, c. 35, s. 1; C. S., s. 5876; 1947, c. 375; 1949, c. 507; 1953, c. 675, s. 14; 1963, c. 448, s. 28.)

ARTICLE 41.

State Schools for the Deaf.

§ 115-336. Incorporation, name and location.—There shall be maintained a school for the white deaf children of the State which shall be a corporation under the corporate name of the North Carolina School for the Deaf, to be located upon the grounds donated for that purpose near the town of Morganton. The North Carolina School for the Deaf shall be classed and defined as an educational institution: Provided that the board of directors and the superintendent of said institution are hereby authorized to change the name of said institution to some other name that will completely eliminate the word "deaf" from the name of said institution. (1891, c. 399, s. 1; Rev., s. 4202; 1915, c. 14; C. S., s. 5888; 1957, c. 1433; 1963, c. 448, s. 28.)

§ 115-345. Directors; selection, self-perpetuation, management of corporation. M. F. Thornton, Reverend M. C. Ransom, J. W. Levy, J. C. Jeffreys, J. E. Shepard, N. A. Cheek, Alex Peace and Reverend G. C. Shaw are hereby named and appointed as members of the board of directors of said "The Central Orphanage of North Carolina." The Governor of North Carolina shall appoint five white citizens of Granville County as members of said board of directors, and the thirteen so named shall constitute the board of directors of said corporation. Said board of directors shall organize by the election of a president and secretary, shall make all necessary bylaws and regulations for the convenient and efficient management and control of the affairs of said corporation, including the method by which successors to the directors herein named shall be chosen. (1927, c. 162, s. 2; 1963, c. 448, s. 28; 1965, c. 617, s. 2.)

Editor's Note. — The 1965 amendment substituted "The Central Orphanage of North Carolina" for "The Colored Orphanage of North Carolina."

§ 115-346. Board of trustees; appropriations; treasurer; board of audit.—The five members of said board of directors so appointed by the Governor shall also serve as a board of trustees of said "The Central Orphanage of North Carolina." The said board of trustees so appointed shall serve for a term of four years and until their successors are chosen. All appropriations made by the General Assembly to the said "The Central Orphanage of North Carolina" shall be under the control of the board of trustees, and said appropriations shall be expended under their supervision and direction. The board of trustees shall select one of their members as a treasurer of the fund appropriated to the institution by the General Assembly and also not more than two persons to act as a board to audit the expenditure of such appropriation. The treasurer shall receive a salary of one hundred dollars per year for his services and members of the board of audit a salary not to exceed one hundred and fifty dollars per year. The treasurer shall give a bond payable to the State of North Carolina in a surety company in such sum as the board of trustees may require, the annual premium to be paid out of the funds of the said Orphanage. (1927, c. 162, s. 3; 1963, c. 448, s. 28; 1965, c. 617, s. 2.)

Editor's Note. — The 1963 amendment substituted "The Central Orphanage of North Carolina" for "The Colored Orphanage of North Carolina."

§ 115-347. Training of orphans.—The said corporation shall receive, train and care for such colored orphan children of the State of North Carolina as under the rules and regulations of said corporation may be deemed practical and expedient, and impart to them such mental, moral and industrial education as may fit them for usefulness in life. (1927, c. 162, s. 4; 1963, c. 448, s. 28.)

§ 115-341. Pupils admitted; education.—The board of directors shall, according to such reasonable regulations as it may prescribe, on application, receive into the school for the purposes of education all white deaf children resident of the State not of confirmed immoral character, nor imbecile or unsound in mind or incapacitated by physical infirmity for useful instruction, who are between the ages of six and twenty-one years: Provided, that the board of directors may admit students under the age of six years when, in its judgment, such admission will be for the best interest of the applicant and the facilities of the school permit such admission. Only those who are bona fide citizens and/or residents of North Carolina shall be eligible to and entitled to receive free tuition and maintenance. The board of directors may fix charges and prescribe rules whereby nonresident deaf children may be admitted, but in no event shall the admission of nonresidents in any way prevent the attendance of any eligible deaf child, resident of North Carolina. The board shall provide for the instruction of all pupils in the branches of study now prescribed by law for the public schools of the State and in such other branches as may be of special benefit to the deaf. As soon as practicable, the boys shall be instructed and trained in such mechanical pursuits as may be suited to them, and in practical agriculture and subjects relating thereto; and the girls shall be instructed in sewing, housekeeping, and

§ 115-360. Principals allowed.—In all schools with fewer than fifty teachers allowed under the provisions of this subchapter, the principals shall be included in the number of teachers allowed. In schools with fifty or more teachers, one whole time principal shall be allowed; that for each forty teachers in addition to the first fifty, one additional whole time principal, when and if actually employed, shall be allowed: Provided, that in the allocation of state funds for principals, the salary of white principals shall be determined by the number of white teachers employed in the white schools, and the salary of colored principals shall be determined by the number of colored teachers employed in the colored schools: Provided, further, that where the schools of a district are under the control of the same district committee, the district principal shall have general supervision of all the schools in the district: Provided, further, that where a white school and a colored school are both under the control of the same district committee, and where the principal of the white school is called upon by the district committee to perform certain duties in connection with the operation of the colored school, such as aiding in the employment of teachers and in the general

education of the industrial classes in the several pursuits and professions of life. (1907, c. [illegible], s. 3; C. S. 5807.)

§ 116-20. Share in appropriations by congress.—The appropriations made or which may hereafter be made by the congress for the benefit of colleges of agricultural and mechanical arts shall be divided between the white and colored institutions in this state in the ratio of the white population to the colored, as ascertained by the preceding national census. (1907, c. 406, s. 1; C. S. 5808.)

Part 3. Woman's College of the University of North Carolina.

§ 116-38. Operation of College for Women at Greensboro. — The North Carolina College for Women shall from and after March 27, 1931, be conducted and operated as a part of the University of North Carolina. It shall be located at Greensboro, North Carolina, and shall be known as the Woman's College of the University of North Carolina. (1931, c. 202, s. 3.)

§ 116-39. Objects of institution.—The objects of the Woman's College of the University of North Carolina shall be to teach young white women all branches of knowledge recognized as essential to a liberal education, such as will familiarize them with the world's best thought and achievement and prepare them for intelligent and useful citizenship; to make special provision for training in the science and art of teaching, school management, and school supervision; to provide women with such training in the arts, sciences, and industries as may be conducive to their self-support and community usefulness; to render to the people of the state such aid and encouragement as will tend to the dissemination of knowledge, the fostering of loyalty and patriotism, and the promotion of the general welfare. (1919, c. 199, s. 3; C. S. 5835.)

§ 116-40. Admission of students.—The board of trustees shall make rules and regulations for the admission of students, but shall not discriminate against any county in the number of students allowed it, in case all applicants cannot be accommodated. Each county shall have representation in proportion to its white school population, if it desires it; and, should any county fail to avail itself of its proportional number, the board of trustees may recognize applicants from counties which already have their proportionate representation. (Rev., s. 4231; 1891, c. 139, s. 4; C. S. 5836.)

Art. 2. East Carolina Teachers' College.

§ 116-66. Incorporation and corporate powers.—The trustees of the East Carolina Teachers' College, established by an act of the general assembly of North Carolina of one thousand nine hundred and seven, and located at Greenville, North Carolina, shall be and are hereby constituted a body corporate by and under the name and style of "The Board of Trustees of the East Carolina Teachers' College," and by that name may sue and be sued, make contracts, acquire real and personal property by gift, purchase, or devise, and exercise such other rights and privileges incident to corporations of like character as are necessary for the proper administration of said college. (1907, c. 820, ss. 11, 12, 16; 1911, c. 150, s. 1; Ex. Sess. 1921, c. 27, s. 1; C. S. 5863.)

§ 116-67. Object of college.—The college shall be maintained by the state for the purpose of giving to young white men and women such education and training as shall fit and qualify them to teach in the public schools of North Carolina. (1907, c. 820, s. 18; 1911, c. 150, s. 2; C. S. 5864.)

§ 116-68. Diplomas and certificates.—The board of trustees, upon the recommendation of the faculty, shall give those students in said college who have completed the prescribed course of study a diploma of graduation, and shall have the

Art. 6. Pembroke State College for Indians.

§ 116-79. Incorporation and corporate powers; location.—The Pembroke State College for Indians shall be and remain a state institution for educational purposes, in the county of Robeson, under the name and style aforesaid, and by that name may have perpetual succession, sue and be sued, contract and be contracted with; have and hold school property, including buildings, lands, and all appurtenances thereto, situated in the county of Robeson, at any place in that county to be selected by the trustees between Bear swamp and Lumber river; acquire by purchase, donation, or otherwise, real and personal property for the purpose of establishing and maintaining a school of high grade for teachers of the race of Cherokee Indians of Robeson county in North Carolina. (Rev., s. 4230; 1887, c. 400, ss. 1, 6; 1911, cc. 168, ss. 1, 2, 215, s. 4; 1913, c. 123, ss. 4, 6; 1911, c. 232, s. 1; C. S. 5842.)

Art. 7. Negro Agricultural and Technical College of North Carolina.

§ 116-92. Establishment and name.—A college of agricultural and mechanical arts is hereby established for the colored race to be located at some eligible site within this state. Such institution shall be denominated The Negro Agricultural and Technical College of North Carolina. (Rev., s. 4221; 1891, c. 549, ss. 1, 2; 1915, c. 267; C. S. 5826.)

§ 116-93. Object of college.—The leading object of the institution shall be to teach practical agriculture and the mechanic arts and such branches of learning as relate thereto, not excluding academical and classical instruction. (Rev., s. 4222; 1891, c. 549, s. 3; C. S. 5827.)

§ 116-94. Board of trustees; appointment; vacancies; president. — The management and control of the college and the care and preservation of all of its property shall be vested in a board of trustees, who shall be elected by the general assembly. The board of trustees shall consist of fifteen members, five of whom shall be elected at each regular session of the general assembly and shall hold office for six years. Any vacancy which, for any cause, may occur, shall be filled by the governor for the unexpired term. The board shall annually elect one of their number to be president of the board of trustees. (Rev., s. 4223; 1891, c. 549, s. 4; 1899, c. 288, s. 1; C. S. 5828.)

§ 116-95. Meetings of board; compensation; executive board.—The number and times of the meeting of the board of trustees shall be fixed by the board, and the trustees shall not receive any pay or per diem, but only their traveling ex-

pils to the college for the various congressional districts of this state as they may deem equitable and right, having due regard to the colored population thereof. (Rev., s. 4228; 1891, c. 549, s. 9; C. S. 5831.)

§ 116-98. Power to receive property, and proportion of congressional donations.—The board of trustees is empowered to receive any donation of property which may be made to the college, and shall have power to invest or expend the same for the benefit of the college; and shall have power to accept on behalf of this college such proportion of the fund granted by the congress of the United States to the state of North Carolina for industrial and agricultural training as is apportioned to the colored race, in accordance with the act or acts of the congress in relation thereto. (Rev., s. 4227; 1891, c. 549, ss. 8, 10; C. S. 5832.)

Art. 8. North Carolina College for Negroes.

§ 116-99. Trustees of the North Carolina College for Negroes at Durham.—There shall be twelve (12) trustees for the North Carolina College for Negroes at Durham. Within thirty days from March 10, 1923, the Governor shall appoint seven (7) members of said board and within six months from March 10, 1923, the Governor shall appoint five (5) members of said board. The terms of office of such trustees shall be four years and until successors are appointed and qualified. At the time of making such appointments he shall designate the members of the present board who are to be succeeded by his appointees. All vacancies are to be filled by the Governor. The Governor shall transmit to the Senate at the next session of the General Assembly following his appointment the names of the persons appointed by him

§ 116-109. Admission of pupils; how admission obtained.—The board of directors shall, on application, receive in the institution for the purposes of education, in the main department, all white deaf children, and in the department for the colored all colored deaf-mutes and blind children, residents of this state, not of confirmed immoral character, nor imbecile, nor unsound in mind, nor incapacitated by physical infirmity for useful instruction, who are between the ages of seven and twenty-one years: Provided, that application shall be made and applicants received at stated times, which shall be at the commencement of some scholastic year.

In case of deaf-mutes the following questions shall be answered:

Name?
Is the child white or colored?
When and where was he born?
Was he born deaf?
At what age did he lose his hearing?
By what disease or accident did he become deaf?
Is the deafness total or partial?
Have any attempts been made to remove the deafness?
Is there any ability to articulate or read on the lips?
Have any attempts been made to communicate instruction?
Is he laboring under any bodily infirmity?
Does he show any signs of mental imbecility or idiocy?
Has he had the smallpox or been vaccinated?
Has he had the scarlet fever?
Has he had the measles?
Has he had the mumps?
Has he had the whooping-cough?

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Art. 11. North Carolina School for the Deaf at Morganton.

§ 116-120. Incorporation and location.—There shall be maintained a school for the white deaf children of the state which shall be a corporation under the corporate name of The North Carolina School for the Deaf, to be located upon the grounds donated for that purpose near the town of Morganton. The North Carolina school for the deaf shall be classed and defined as an educational institution. (Rev., s. 4203; 1891, c. 399, s. 1; 1918, c. 14; C. S. 5888.)

§ 116-124. Pupils admitted; education. — The board of directors shall, according to such reasonable regulations as it may prescribe, on application, receive into the school for the purposes of education all white deaf children resident of the state not of confirmed immoral character, nor imbecile or unsound in mind or incapacitated by physical infirmity for useful instruction, who are between the ages of eight and twenty-three years: Provided, that the board of directors may admit students under the age of eight years when, in its judgment, such admission will be for the best interest of the applicant and the facilities of the school permit such admission. Only those who have been bona fide citizens of North Carolina for a period of two years shall be eligible to and entitled to receive free tuition and maintenance. The board of directors may fix charges and prescribe rules whereby nonresident deaf children may be admitted, but in no event shall the

ARTICLE 13.

Colored Orphanage of North Carolina.

§§ 116-138 to 116-142: Transferred to §§ 115-344 to 115-348 by Session Laws 1963, c. 448, s. 28.

ARTICLE 13A.

Negro Training School for Feebleminded Children.

§§ 116-142.1 to 116-142.10: Repealed by Session Laws 1963, c. 1184, s. 8.

§ 116-141. Training of orphans.—The said corporation shall receive, train and care for such colored orphan children of the State of North Carolina as under the rules and regulations of said corporation may be deemed practical and expedient.

Art. 14. General Provisions as to Tuition Fees in Certain State Institutions.

§ 116-143. State-supported institutions required to charge tuition fees.—The trustees of the University of North Carolina, including the University of North Carolina, the State College of Agriculture and Engineering and the Woman's College of the University of North Carolina, and the trustees of the East Carolina Teachers' College, the Western Carolina Teachers' College, the Appalachian State Teachers' College, the Negro Agricultural and Technical College, the Winston-Salem Teachers' College, the Fayetteville State Teachers' College, the Elizabeth City State Teachers' College, the North Carolina College for Negroes and the Pembroke State College for Indians, be and they are hereby authorized and directed to fix the tuition fees for their several state supported institutions, each board of trustees acting separately for their respective institutions, in such amount or amounts as they may deem best, taking into consideration the nature of each department and institution and the cost of equipment and maintaining the same; and are further instructed to charge and collect from each student, at the beginning of each semester, tuition fees and an amount sufficient to pay room rent, servants' hire and other expenses for the term. Indigent cripples are exempt from the provisions of this article.

In the event that said students are unable to pay the cost of tuition, as the same may become due, in cash, the said several boards of trustees are hereby authorized and empowered, in their

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discretion, to accept the obligation of the student or students together with such collateral or security as they may deem necessary and proper, it being the purpose of this article that all students in state institutions of higher learning shall be required to pay tuition, and that free tuition be and the same is hereby abolished, except such students as are physically disabled, and are so certified to be by the vocational rehabilitation division of the state board for vocational education, who shall be entitled to free tuition in any of the institutions named in this article. (1933, c. 320, s. 1; 1939, cc. 178, 253.)

§ 116-144. Higher fees from non-residents may be charged.—The provisions of this article shall not be construed to prohibit the several boards of trustees from charging non-resident students tuition in excess of that charged resident students. (1933, c. 320, s. 3.)

§ 122-3. Division of territory and patients between Raleigh, Morganton and Goldsboro institutions.—The state hospital at Raleigh and the state hospital at Morganton shall be exclusively for the accommodation, maintenance, care and treatment of the white insane of the state, and the state hospital at Goldsboro shall be exclusively for the accommodation, maintenance, care and treatment of the colored insane, epileptics, feebleminded and inebriates of the state. The line heretofore agreed upon by the directors of the state hospital at Raleigh and the state hospital at Morganton shall be the line of division between the territories of said hospitals, and white insane persons settled in counties east of said line shall be admitted to the state hospital at Raleigh, and white insane persons settled in counties west of said line shall be admitted to the state hospital at Morganton; epileptics shall be admitted as now provided by law. White inebriates shall be admitted to the state hospital at Raleigh (1929, c. 265, s. 1; 1933, c. 342, s. 1; C. S. 6153(a).)

§ 122-5. Cherokee Indians of Robeson county and Croatan Indians of other counties.—All the insane and inebriate Cherokee Indians of Robeson county, and all the insane and inebriate Croatan Indians of the other counties of the state, shall be cared for in the hospital for the insane at Raleigh in wards separate and apart from the white patients in said hospital, and all such Cherokee Indians of Robeson county and Croatan Indians of the other counties of the state shall be cared for and receive the same treatment as other patients in said hospital receive. (1919, c. 211; C. S. 6154.)

§ 122-6. Epileptics cared for at Raleigh.—Whenever it becomes necessary for any white person of this state, afflicted with the disease known as epilepsy, to be confined or to receive hospital treatment, such person shall be accommodated, maintained, cared for, and treated at the state hospital at Raleigh. Such epileptics shall be committed by the clerks of the superior courts of the several counties to the state hospital at Raleigh in the manner now provided by law for the commitment of insane persons to the several hospitals for the insane; and when such persons shall be committed it shall be the duty of the superintendent of the state hospital at Raleigh, and he is required, to receive such persons and care for, maintain, and treat them at the hospital at Raleigh, if the superintendent shall find such persons to be afflicted to such extent as properly to become a public charge: Provided, that any person so committed who is able

§ 127-6. White and colored enrolled separately.—The white and colored militia shall be separately enrolled, and shall never be compelled to serve in the same organization. No organization of colored troops shall be permitted where white troops are available, and while permitted to be organized, colored troops shall be under command of white officers. (1917, c. 200, s. 8; C. S. 67[illegible])

§ 130-128. Approval of housing projects. — No housing project proposed by a limited dividend housing corporation incorporated under this article shall be undertaken, and no building or other construction shall be placed under contract or started without the approval of the board. No housing project shall be approved by the board unless:

(a) It shall appear practicable to rent or sell the housing accommodations to be created at prices not exceeding those prescribed by the board. No such project shall be approved in contravention of any zoning or building ordinance in effect in the locality in which designated areas are located.

(b) There shall be submitted to the board a financial plan in such form and with such assurances as the board may prescribe to raise the actual cost of the lands and projected improvements by subscriptions to or the sale of the stock, income debentures and mortgage bonds of such corporation. Whenever reference is made in this article to cost of projects or of buildings and improvements in projects, such cost shall include charges for financing and supervision approved by the board and carrying charges during construction required in the project including interest on borrowed and, where approved by the board, on invested capital.

(c) There shall be such plans of site development and buildings as show conformity to reasonable standards of health, sanitation, safety and provisions for light and air, accompanied by proper specifications and estimates of cost. Such plans and specifications shall not in any case fall below the requirements of the health, sanitation, safety and housing laws of the state and shall meet superior requirements if prescribed by local laws and ordinances.

(d) The corporation agrees to accept a designee of the board of housing as a member of the board of directors of said corporation.

(e) If required by the board, the corporation shall deposit all monies received by it as proceeds of its mortgage bonds, notes, income debentures, or stock, with a trustee which shall be a banking corporation authorized to do business in the state of North Carolina and to perform trust functions, and such trustee shall receive such monies and make payment therefrom for the acquisition of land, the construction of improvements and other items entering into cost of land improvements upon presentation of draft, check or order signed by a proper officer of the corporation, and, if required by the board, countersigned by the said board or a person designated by it for said purpose. Any funds remaining in the custody of said trustee after the completion of the said project and payment or arrangement in a manner satisfactory to the board for payment in full thereof shall be paid to the corporation. (1933, c. 384, s. 5.)

§ 131-124. Medical training for negroes.—The North Carolina Medical Care Commission shall make careful investigation of the methods for providing necessary medical training for negro students and shall report its findings to the next session of the General Assembly. In addition to the benefits provided by § 116-110, the North Carolina Medical Care Commission is hereby authorized to make loans to negro medical students from the fund provided in § 131-121, subject to such rules, regulations, and conditions as the Commission may prescribe. (1945, c. 1096.)

Eastern Carolina Industrial Training School for Boys.

§ 134-67. Corporation created; name; powers.—A corporation to be known and designated as the Eastern Carolina Industrial Training School for Boys is hereby created, and as such corporation and under said name it may sue and be sued, plead and be impleaded, hold, use, and sell and convey real estate, receive gifts and donations and appropriations, and do all other things necessary and requisite for the purposes of its organization as hereinafter specified. (1923, c. 254, s. 1; C. S., s. 7362(a).)

§ 134-68: Repealed by Session Laws 1943, c. 776, s. 15.

§ 134-69. Establishment and operation of school; boys subject to committal; control; term of detention.—The trustees are empowered to establish and operate a school for the training and moral and industrial development of the criminally delinquent white boys of the State; and when such school has been organized the trustees may, in their discretion, receive therein such delinquent and criminal boys under the age of twenty years as may be sent or committed thereto under any order or commitment by the judges of the superior courts, the judges of the juvenile courts, or the recorders, or other presiding officers of the city or criminal courts, and shall have the sole right and authority to keep, restrain, and control them during their minority, or until such time as they shall deem proper for their discharge, under proper and humane rules and regulations as may be adopted by the trustees. (1923, c. 254, s. 3; C. S., s. 7362(c); 1937, c. 116.)

Morrison Training School.

§ 134-79. Creation of corporation; name; powers.—A corporation, to be known and designated "The Morrison Training School," hereby created, and as such corporation it is authorized and empowered to accept and use donations and appropriations, hold real estate by purchase or gift, and do all other things necessary and requisite to be done for the care, discipline and training of negro boys which may be received by said corporation. (1921, c. 190, s. 1; C. S., s. 5912(a); 1937, c. 146.)

§ 134-82. Delinquents committed to institution; cost; age limit.—Delinquent negro boys, under the age of sixteen years, may be committed to the institution by any juvenile, State, or other court having jurisdiction over such boy, but no boy shall be sent to the institution until the committing agency has received notice from the superintendent that such person can be received. The cost of sending inmates shall be paid by the county or municipality sending the same, as the case may be. In special cases where the public good would seem to be subserved thereby the board shall have the right, upon the request of any court of proper jurisdiction, to receive an inmate above the age of sixteen, but this shall be a matter wholly within the discretion of the board. When any commitment to the institution is made, it shall not be for any specified time, but may continue or terminate at the discretion of the board, not to exceed the age of majority of the inmate. (1921, c. 190, s. 4; C. S., s. 5912(d).)

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State Training School for Negro Girls.

§ 134-84.1. Creation and name.—An institution, to be known and designated as State Training School for Negro Girls, is hereby created, and such institution is authorized and empowered to accept and use donations and appropriations and do all other things necessary and requisite to be done in furtherance of the purpose of its organization and existence as hereinafter set forth. (1943, c. 381, s. 1.)

§ 134-84.4. Operation of institution before permanent quarters established.—In order to provide for the operation of the said institution prior to the time that permanent quarters can be established, the board of directors, with the approval of the Governor and Council of State, is authorized and empowered to enter into an agreement with any other State institution or agency for the temporary uses of any State-owned property which such other State institution or agency may be able and willing to divert for the time being from its original purpose; and any other State institution or agency, which may be in possession of real estate suitable for the purpose of the State Training School for Negro Girls and which is not occupied or needed by said institution or agency, is hereby authorized to turn such real estate over to the directors of the State Training School for Negro Girls upon such terms as may be mutually agreed upon. (1943, c. 381, s. 4.)

§ 134-84.7. Committal and delivery of girls to institution; no inmate detained after becoming of age.—Any negro girl under the age of sixteen years, who may come or be brought before any juvenile court of the State or other court of competent jurisdiction, and may be found by such court to be in need of institutional training, may be committed by such court to the institution for an indefinite period: Provided, that such person is not insane or mentally or physically incapable of being substantially benefited by the discipline of the institution: Provided, further, that before committing such person to the institution, the court shall ascertain whether the institution is in a position to care for such person; and that it shall be at all times within the discretion of the board of directors as to whether the board will receive any person into the institution. No commitment shall be for any definite term, but any person so committed may be conditionally released or discharged by the board of directors at any time after commitment, but in no case shall any inmate be detained in the institution for a period longer than such time at which she may attain the age of twenty-one years. It shall be the duty of the county authorities of the county from which any girl is sent to the institution or the city authorities, if any is ordered to be sent to the institution by any city court, to see that such girl is safely and duly delivered to the institution, and to pay all the expenses incident to her conveyance and delivery to the institution. (1943, c. 381,

§ 134-84.9. Contract to care for certain girls within federal jurisdiction.—The board of directors shall have power and they are hereby authorized, shall it be deemed necessary, to enter into a contract with the office of the United States Attorney General or such necessary federal agency, to keep, restrain, control, care, and train any negro girl under the age of sixteen years, being a citizen of the State of North Carolina, who may come within the jurisdiction of the several federal

Conditional Release and Final Discharge of Inmates of Certain Training and Industrial Schools.

§ 134-85. Conditional release.—The superintendent of the State Home and Industrial School for Girls, of the Stonewall Jackson Manual Training and Industrial School, of the Eastern Carolina Industrial Training School for Boys, and of the Morrison Training School for Negro Boys, shall have power to grant a conditional release to any inmate of the institution over which such superintendent presides, under rules adopted by the board of trustees or managers of such institution, and such conditional release may be terminated at any time by the written revocation of such superintendent, which written revocation shall be sufficient authority for any officer of the school or any peace officer to apprehend any inmate named in such written revocation, in any county of the State, and to return such inmate to the institution from which he or she was conditionally released. Such conditional release shall in no way affect any suspended sentence, a condition of which is that the inmate be admitted to and remain at such institution. (1937, c. 145, s. 1.)

Editor's Note.—The Morrison Training School for Negro Boys is now known as the Morrison Training School. See §§ 134-79 and 134-91.

Cited in In re Burnett, 225 N. C. 648, 36 S. E. (2d) 75 (1945).

§ 134-86. **Final discharge.**—Final discharge of any inmate of any institution enumerated in § 134-85 may be granted by the superintendent of such institution, under rules adopted by the board of directors or managers, at any time after such inmate has been admitted to the institution: Provided, however, that final discharge must be granted before such inmate arrives at his or her twenty-first birthday. (1937, c. 145, s. 2.)

ARTICLE 8.

Care of Persons under Federal Jurisdiction.

§ 134-87. **Certain correctional institutions to make contracts with federal agencies for the care of persons under federal jurisdiction.**—The governing boards of the Stonewall Jackson Manual Training and Industrial School, Morrison Training School for Negro Boys, Eastern Carolina Training School, the State Home and Industrial School for Girls, and the State Industrial Farm Colony for Women may contract with the office of the United States Attorney General, the Bureau of Prisons of the United States Department of Justice, or such necessary federal agency for the care, keeping, correction, training, education, and supervision of delinquent children or other persons under the jurisdiction, custody, or care of the federal courts or of the said office of the United States Attorney General, the Bureau of Prisons of the United States Department of Justice, or such necessary federal agency, as authorized by the terms of the Federal Juvenile Delinquency Act of one thousand nine hundred thirty-eight, and may receive, accept, hold, train, and supervise such persons as may be received from said courts or department under the rules and regulations of the several and respective institutions as prescribed or as may hereafter be established by the said governing boards, provided, however that such contracts or subsequently established rules of care, procedure, and training, of those committed to said institutions, first shall have been approved by the State Board of Public Welfare. (1939, c. 166, s. 1.)

§ 134-91. **Powers and duties of the State Board of Juvenile Correction.**—The following institutions, schools and agencies of this State, namely, the Stonewall Jackson Manual Training and Industrial School, the State Home and Industrial School for Girls, Dobb's Farms, the Eastern Carolina Industrial Training School for Boys, the Morrison Training School, and the State Training School for Negro Girls, together with all such other correctional State institutions, schools or agencies of a similar nature, established and maintained for the correction, discipline or training of delinquent minors, now existing or hereafter created, shall be under the management and administrative control of the State Board of Juvenile Correction.

Wherever in §§ 134-1 to 134-48, inclusive, or in §§ 134-67 to 134-89, inclusive, or in any other laws of this State, the words "board of directors," "board of trustees," "board of managers," "directors," "trustees," "managers," or "board" are used with reference to the governing body or bodies of the institutions, schools or agencies enumerated in § 134-90, the same shall mean the State Board of Juvenile Correction provided for in § 134-90, and it shall be construed that the State Board of Juvenile Correction shall succeed to, exercise and perform all the powers conferred and duties imposed heretofore upon the separate boards of directors, trustees or managers of the several institutions, schools or agencies herein mentioned, and said powers and duties shall be exercised and performed as to each of the institutions by the State Board of Juvenile Correction herein provided for. The said Board shall be responsible for the management of the said institutions, schools or agencies and the disbursement of appropriations made for the maintenance and permanent enlargement and repairs of the said institutions, schools or agencies subject to the provisions of the Executive Budget Act, and said Board shall make report to the Governor annually, and oftener if called for by him, of the condition of each of the schools, institutions or agencies under its management and control, and shall make biennial reports to the Governor, to be transmitted by him to the General Assembly, of all moneys received and disbursed by each of said schools, institutions or agencies.

The State Board of Juvenile Correction shall have full management and control of the institutions, schools and agencies named in this article, and shall have power to administer these institutions, schools and agencies in the manner deemed best for the interest of delinquent boys and girls of all races. Similar provisions shall be made for white and negro children in separate schools. Indian children shall be provided for in a manner comparable to that afforded children of the white and negro races. Individual students may be transferred from one institution, school or agency to another, but this authority to transfer individual students does not authorize the consolidation or abandonment of any institution, school or agency. The Board of Juvenile Correction, subject to the approval of the Governor and the Advisory Budget Commission, is authorized to transfer the entire population at Dobb's Farms to the State Home and Industrial School for Girls and to utilize the present facilities at Dobb's Farms as a training school for negro girls.

The State Board of Juvenile Correction is hereby vested with administrative powers over the schools, institutions and agencies set forth in this article, together with all lands, buildings, improvements, and other properties appertaining thereto, and the Board is authorized and empowered to do all things necessary in connection therewith for the care, supervision and training of boys and girls of all races who may be received at any of such schools, institutions or agencies. (1947, c. 226; 1963,

§ 148-44. Segregation as to race, sex and age.—The commission shall provide separate sleeping quarters and separate eating space for the different races and the different sexes; and, in so far as it is practical to do so, shall provide for youth-

§ 153-201. Organization meeting; purchase of site; equipment; separation of races and sexes.—The board of trustees shall, as soon as possible, and not later than sixty days after appointment, meet and organize by electing a chairman and secretary. They shall proceed promptly with the purchase of a farm of suitable size, location and fertility, giving due consideration to sanitary surroundings and transportation facilities. They shall provide for the necessary stock, tools, and farm equipment, and shall cause to be erected suitable buildings for the housing, detention and keeping the prisoners assigned to said district farm, due regard being given to the separation of the sexes and races and such other plans for segregation as their judgment and existing conditions may suggest. (1931, c. 142, s. 3.)

§ 153-51. Jail to have five apartments.—The common jails of the several counties shall be provided with at least five separate and suitable apartments, one for the confinement of white male criminals, one for white female criminals, one for the colored male criminals; one for colored female criminals; and one for other prisoners. (Rev., s. 1334; Code, s. 783; R. C., c. 30, s. 8; 1795, c. 433, s. 4; 1818, c. 911; C. S. 1318.)

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Senator EAST. We wish to now welcome the Honorable William Bradford Reynolds, the Assistant Attorney General in charge of the Civil Rights Division.

We deeply appreciate your coming, Mr. Reynolds, and your patience in waiting for a Senate which always seems to be running a few minutes behind.

We appreciate your statement being as concise as possible, consistent with your responsibilities. Then I am going to turn this over immediately to Senator Baucus so that he might ask you what questions he has. Please proceed.

STATEMENT OF HON. WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. REYNOLDS. Thank you, Mr. Chairman.

I would like to read my statement, if I could. I will try to do it as rapidly as I can in order to provide time for Senator Baucus.

Thank you, Mr. Chairman and members of the subcommittee, for inviting me to testify on the critically important subject of school desegregation. Few contemporary domestic issues command as much public attention as the question of how this administration and this Congress plan to respond to the problem of unconstitutional racial segregation of our public schools.

Virtually everyone, I believe, agrees with the ultimate objective—that is, complete eradication of State-imposed racial segregation. Moreover, we all probably can agree that the achievement of this objective is central to the constitutional promise of equal protection of the laws.

In recent years, however, we have witnessed growing public disenchantment with some of the remedies used to accomplish the constitutional imperative of eliminating racial discrimination in public schooling.

The hearings being conducted by this subcommittee underscore an increased public awareness of the need to develop enlightened and forward-looking school desegregation remedies and to eliminate those techniques which have in too many instances proved ineffective, and even counterproductive, in the past.

To this end, this subcommittee is currently considering several bills dealing with the subject of school desegregation. While the remedial formulas contained in these bills differ in a number of respects, both in terms of the procedural approach suggested and in terms of the substantive relief contemplated all sound the same theme—compulsory busing of students in order to achieve racial balance in the public schools is not an acceptable remedy.

As a matter of administration policy, this theme has been endorsed by the President, the Vice President, the Secretary of Education, the Attorney General, and me.

The administration is thus clearly and unequivocally on record as opposing the use of mandatory transportation of students as an element of relief in future school desegregation cases.

Stating our opposition to compelled busing, however, is but a starting point in developing just and sound policies to achieve the central aim of school desegregation—equal education opportunity.

If mandatory busing is not an acceptable tool with which to combat unconstitutional racial segregation of our public schools, it is incumbent upon all branches of Government to develop reasonable and meaningful alternatives designed to remove remaining State-enforced racial barriers to open student enrollment and to insure equal education opportunity for all, without regard to race, color, or ethnic origin.

It is in the area of developing just such meaningful alternative approaches, to accomplish to the fullest extent practicable the desegregation of unconstitutionally segregated public schools, that we at the Department of Justice have been concentrating our attention in recent months.

Since this subcommittee is engaged in much the same effort through the legislative process, I am pleased to have this opportunity to share with you the thoughts and tentative conclusions resulting from our analysis to date.

Let me note at the outset that my remarks today are directed only to the policy considerations raised by the several bills currently before this subcommittee.

Other questions have been raised regarding the constitutionality of legislation that seeks to restrict the jurisdictional authority of Federal courts to order certain relief. Those complex constitutional issues are being carefully scrutinized by the Department of Justice.

Because that review has not yet been completed, I will, for the present, place to one side all discussion relating to the constitutional implications of the several bills in question and turn my attention solely to the remedial considerations under development by this administration to vindicate the constitutional and statutory requirements of equal education opportunity.

I hope that this subcommittee will find the administration's analysis and the policies borne of that analysis useful in its consideration of appropriate legislation in this area.

The Department's responsibility in the field of school desegregation derives from title IV, VI, and IX of the Civil Rights Act of 1964, as well as the Equal Education Opportunity Act of 1974.

It is important to emphasize that these statutes do not authorize the Department of Justice to formulate education policy. Nor could they, for under our Federal system, primary responsibility for formulating and implementing education policies is constitutionally reserved to the States and their local school boards.

In carrying out this responsibility however, the States cannot transgress constitutional bounds; and the Department's basic mission under these Federal statutes, a mission to which this administration is fully committed, is to enforce the constitutional right of all children in public schools to be provided an equal education opportunity, without regard to race, color, or ethnic origin.

In discussing with you the particulars of how we intend to enforce this constitutional right, it is important to frame the discussion in proper historical perspective.

Brown v. *Board of Education,* 347 U.S. 483—1954—is of course the starting point. In *Brown* the Supreme Court held that even though physical facilities and other tangible elements of the educational environment may be equal, State-imposed racial segregation of public school students deprives minority students of equal protection of the laws. Id. at 493.

Casting aside the shameful separate-but-equal doctrine established some 84 years earlier in *Plessy* v. *Ferguson,* 110 U.S. 537—1896—the Court held that State-imposed racial separation inevitably stigmatizes minority students as inferior. Id. at 494.

The Court concluded therefore that State-enforced racially separated education facilities are inherently unequal. Id. at 495.

One year after the initial decision in *Brown,* the Supreme Court, in *Brown II,* ordered that the Nation's dual school systems be dismantled with all deliberate speed *Brown* v. *Board of Education,* 349 U.S. 294, 300-301, 1955—*Brown II.* The goal of a desegregation remedy, the Court declared, is the admission of students to public schools on a racially nondiscriminatory basis. Id.

During the period following *Brown II,* State and local officials engaged in widespread resistance to the Court's decision. Thus, few jurisdictions made any real progress toward desegregation.

In 1968, 13 years after *Brown II,* the Supreme Court's patience ran out. In *Green* v. *County School Board,* 391, U.S. 430—1968—the Court was confronted with a freedom of choice plan that had the effect of preserving a dual system. In disapproving this plan, the Court made clear that a desegregation plan must be judged by its effectiveness in disestablishing State-imposed segregation. Id. at 439.

The burden on a school board that has operated a dual system, the Court explained, "is to come forward with a plan that promises realistically to work and promises realistically to work now." Id.

In neither *Brown* nor *Green,* however, did the Court assert that racial balance in the classroom is a constitutional requirement or an essential element of the relief necessary to redress State-enforced segregation in public schools.

Rather, the Court held simply that the Constitution requires racially nondiscriminatory student assignments and eradication of the segregative effects of past intentional racial discrimination by school officials.

Because of the problems encountered by the lower courts in implementing the *Green* decision, the Supreme Court returned to the subject of a school board's remedial obligations 3 years later in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1—1971.

Swann specifically rejected any "substantive constitutional right [to a] particular degree of racial balance." Id. at 24, and reiterated that the basic remedial obligation of school boards is "to eliminate from the public schools all vestiges of State-imposed segregation." Id. at 15.

For the first time however, the Court authorized use of mandatory race-conscious student assignments to achieve this objective, explaining that racially neutral measures such as neighborhood zoning may fail to counteract the continuing effects of past unconstitutional segregation. Id. at 27–28.

Moreover, in light of the prevalence of bus transportation in public school systems, the *Swann* court upheld the use of mandatory bus transportation as a permissible tool of school desegregation. Id. at 29–30.

Thus, in what has proved to be the last unanimous opinion by the High Court in the school desegregation area, the first tentative step was taken down the remedial road of court-ordered, race-conscious pupil assignments and transportation. Since then, that road has been traversed involuntarily more and more often by the yellow school bus because of a preoccupation with racial ratios in the classroom as a desegregation remedy.

What is interesting to note however is that the *Swann* court spoke in measured terms, expressing reserved acceptance of busing as but one of a number of remedial devices available for use when, and these are the Supreme Court's words, it is "practicable," "reasonable," "feasible," "workable," and "realistic."

The Court clearly did not contemplate indiscriminate use of busing without regard to other important and often conflicting considerations. Indeed, the *Swann* court, emphasizing the multiple public and private interests that should inform a desegregation decree, expressed disapproval of compulsory busing that risks the health of students or significantly impinges on the educational process, made clear that busing can be ordered only to eliminate the effects of State-imposed segregation and not to attain racial balance in the schools, and tacitly admonished courts to rely on experience in exercising their equitable remedial powers.

Today, a decade after *Swann,* there is ample reason to heed that admonition. Justice Oliver Wendell Holmes counseled wisely, in his book "The Common Law," that, "the life of the law has not been logic, it has been experience."

Unlike 1971, when no court had any empirical evidence on which to assess the advisability or effectiveness of mandatory busing, now we have 10 years of experience and the results of hundreds of busing decrees on which to draw in formulating current desegregation policies.

It is against this backdrop that courts, legislators, and the public must—as *Swann* itself signaled—now reconsider the wisdom of mandatory busing as a remedy for *de jure* segregation.

Few issues have generated as much public anguish and resistance, and have deflected as much time and resources away from needed endeavors to enrich the educational environment of public schools, as court-ordered busing.

The results of numerous studies aimed at determining the impact of busing on educational achievement are at best mixed. There has yet to be produced sufficient evidence showing that mandatory transportation of students has been adequately attentive to the seemingly forgotten "other" objective of both *Brown* and *Swann*—namely, establishment of an educational environment that offers——

Senator **East**. Excuse me for interrupting.

Senator Baucus is under these severe time restraints. He has had an opportunity to look through your statement. We will let you finish it up in one moment. If you would not mind—since he has had a chance to read the full statement here—answering a few questions he might have before he has to leave, then we could go back to letting you complete your statement. We hope that is reasonably satisfactory to you.

Mr. **Reynolds**. Certainly. I will pick it up at the beginning rather than the middle of that sentence.

Senator **East**. All right. Fine. Thank you very much.

Senator Baucus?

Senator **Baucus**. Thank you very much, Mr. Attorney General; and I thank you, Mr. Chairman.

My first question is one that you have already dealt with in your statement. You stated that you are prepared to address the question of limitation on Federal court jurisdiction. Does the Department have a position on this bill? Do you favor it, or do you not favor 1647?

Mr. **Reynolds**. As I indicated, Senator, the Department is studying the bill in terms of the constitutional questions that are raised, and until that study is completed I am not in a position to comment.

Senator **Baucus**. When will that be completed?

Mr. **Reynolds**. I am personally not undertaking that study. That is being done primarily in the Office of Legal Counsel at the Department of Justice, so I am not sure what the timetable is.

Senator **Baucus**. What is your best guess?

Mr. **Reynolds**. I do not have a best guess at this time.

Senator **Baucus**. I am a little concerned, because the Department has known about this bill for a long time and about other bills limiting Federal court jurisdiction.

We have to vote on this bill next week; and, as the chairman has indicated, some of us have a public responsibility to move forward.

I think the Department has an obligation to come forward and tell us what the Department's view is with respect to the constitutionality of this bill.

Why has the Department taken so long? You have known about this for a long time. Are you afraid to make the decision?

Mr. **Reynolds**. Senator, I am not the one undertaking that review of the constitutional question.

Senator **Baucus**. But you are here speaking for the Department on this bill, so why has not the Department taken a position on this bill? Why are you not here yet advising us whether to pass or not pass this bill?

Mr. **Reynolds**. Because the study of what is a terribly complex question relating to the constitutional implications of the bill has not yet been completed.

Senator **Baucus**. Are you going to make a decision before Friday—before this bill is marked up by this subcommittee?

Mr. **Reynolds**. I can certainly take back to the Attorney General your concern that the Department has not yet reached a decision and ask whether we could, if necessary, adjust our timetable in order to accommodate that concern.

Senator **Baucus**. Very candidly, I have the feeling that the Department, or at least the administration, ideologically favors this bill. I do not think this administration likes busing or wants busing under any circumstances.

On the other hand, I have the feeling that this administration also recognizes the dangers of limiting lower Federal court jurisdiction—the dangers of that precedent—and accordingly the Department is afraid to make a decision.

Mr. REYNOLDS. I am not aware of anybody in the Department who is working on this problem indicating any fear about making a decision.

Senator BAUCUS. Why is it taking so long? This issue has been around for months and months, and the Department has known of this hearing and other hearings; yet there is no indication the Department is ever going to make any decision. I hear, "Well, we are thinking about it; we are studying it." You give me no indication as to when that study will be complete.

Mr. REYNOLDS. I am not the individual in the Department to give you the answer.

Senator BAUCUS. Have you discussed this matter with the Department?

Mr. REYNOLDS. Not as to the timetable of when they are going to complete it.

Senator BAUCUS. Why not?

Mr. REYNOLDS. That is not a matter within the area of my responsibility.

Senator EAST. Would the Senator yield for one point of inquiry?

Senator BAUCUS. Sure.

Senator EAST. I would like to offer a thought on the Senator's very pertinent inquiry. We have not pressed the Department to do so.

I would argue myself, as a matter of separation of powers, that certainly Congress is free to proceed with remedies that it feels it has under the Constitution to effect policy change. I do feel we have this power under article 3 and also under the 14th amendment. So it is in that spirit which we proceed.

This is not to say I would be opposed to the administration offering an opinion on this, be it solicited or unsolicited. I am not here attempting to help Mr. Reynolds, who is more than able to state his own position, but I am saying no one has pressured him to do so.

Perhaps from their own vantage point—again, no one knows—it may well be that they feel we have undertaken a course of action, and we should be free to pursue it, and they need not track us every step of the way and offer gratuitous opinions along the way as to whether what we are doing is fully consistent with their own view of the matter.

What I am saying is that I do not know that the administration has been delinquent here in anything, in that I as the chairman of the subcommittee have not so pressured them, and I do not know that the chairman of the Judiciary Committee has done so, and that the majority leader or other Senate leadership has not requested clarification and they have failed to provide it.

You have allowed us to work our own way, which I find very consistent with the idea of separation of power in our legislative function.

Excuse me.

Senator BAUCUS. I thank the chairman. The question really is not whether this committee of the Congress has the authority to make these decisions, of course we do. One of the objectives of these hearings, is to evaluate the constitutionality of this bill. I thought that therefore witnesses, particularly witnesses from the Department of Justice should address that issue.

Second, the House Judiciary Committee has repeatedly asked the Department for the Department's views on the constitutionality of the court jurisdiction bills; and so far the Department has refused to respond to those requests.

So the Department has been put on notice that at least one House of Congress is interested, and the Department is now on notice that at least one member of the other body is also interested in the Department's view.

Turning to another matter, the bill, as you know, Mr. Reynolds, precludes court orders that might reassign students, or close or open schools, or reassign teachers. Yet you were reported to have stated in a New York Times interview that the Department may use the remedy of reassigning teachers in seeking to redress discrimination in schools.

Since this bill would preclude that remedy, are you recommending that this committee delete that provision of the bill or not?

Mr. Reynolds. My testimony that I have not yet finished does address that area.

Senator Baucus. What is the Department's view on that point?

Mr. Reynolds. I think our view is that a useful remedial technique that is now available and, in our view, might well be observed where you have a finding of assignment of teachers based on race-conscious assignments would be to undo that violation by permitting a reassignment of teachers.

Senator Baucus. So are you therefore recommending that that portion of the bill be modified to allow the Department to make that recommendation—that is, to recommend under appropriate circumstances the reassignment of teachers as a remedy?

Mr. Reynolds. I think the recommendation would be that, instead of completely precluding that as an available remedy, there are instances where reassignment of teachers after a finding of a race-conscious assignment constituting de jure segregation is a tool that has not been accompanied by the same kind of disruptive results as busing. It is a tool that seems to be effective in the area of trying to achieve some desegregation and in appropriate cases is one that we would anticipate using if it is not precluded.

Senator Baucus. So the Department disagrees with that part of the bill which would preclude reassignment of teachers as a remedy?

Mr. Reynolds. Generally, I think that is right.

Senator Baucus. Does the Department also disagree with that part of the bill which would prevent the use of closing or opening of schools as a remedy? On page 13 of your testimony you say that you will use that as a remedy.

Mr. Reynolds. Again, let me be clear. I think that as those provisions are now couched the prohibition, in our view, is overbroad. I think there can be use made of closing schools where there is an excess capacity in the system and a consolidation of different schools as a result of those closings, which could be used to further the desegregation remedy.

I think you have to be careful when you use that and how you do it. I am not suggesting that it will be used in all cases, but I think there may well be——

Senator BAUCUS. Some cases. And therefore the Department would disagree with that portion of this bill that is before us which would preclude those remedies?

Mr. REYNOLDS. I would hope there could be some modification of that part of the bill.

Senator BAUCUS. I get from the general tone of your statement that the Department will work to insure that minority schools are of equal caliber to other schools. How does that policy differ from the "separate but equal" doctrine of *Plessy* v. *Ferguson*? Is that not the same as Plessy?

Mr. REYNOLDS. Absolutely not.

First, when you are talking about a finding of de jure segregation, part of the remedy in addition to enhancing educational quality is to remove the racial barriers imposed by the States. That clearly would remove the "separate" prong of the "separate but equal" doctrine of *Plessy* v. *Ferguson*.

If you have, beyond that, a de facto segregation policy where you do have separate schools, there is no constitutional violation with regard to that. The courts have held that I guess from the beginning. If you do not have any State action associated, but the neighborhoods have evolved in a natural way and there are some neighborhoods that are essentially one race and they have a one-race school, and the conclusion is that that is a de facto separation, the courts have said there is no constitutional infirmity at all with regard to that.

Our position is that, notwithstanding the fact that there is no unconstitutional separation, if you have different treatment by the school board of schools in those minority areas than you do in other areas of the system, that should be attended to and looked at carefully under the equal protection clause.

There is no "separate but equal" concept at all in either prong of that analysis.

Senator BAUCUS. I just think it is a dangerous distinction, and I think a lot of people will have some trouble with it.

The trouble is that we cannot address the constitutional issues here, because you are unwilling to address them. That I think is the heart of this hearing.

Mr. REYNOLDS. That is not the constitutional issue—that is totally different from the constitutional issue you raised before.

Senator BAUCUS. I am talking about the issue of lower Federal court jurisdiction—which you are unwilling to address.

Mr. REYNOLDS. That does not relate to the constitutional issues that I just raised with you or responded to.

Senator BAUCUS. I understand too that it is the policy of the administration to rely heavily on various alternate programs and remedies, such as the use of magnet schools.

Why did the administration then press for the elimination of the Emergency School Aid Act, which is the Federal desegregation aid program? If we are going to have other alternate remedies that work, such as magnet schools, it seems to me that the Department would press the Federal Government to aid those schools financially, not take away aid.

Mr. **Reynolds**. I think one of the major elements that we should not lose sight of in this whole area is that it is for the State and local governments to be achieving desegregation remedies—to be affording education to students on an equal basis.

I am not suggesting that the Federal Government come in and put magnet schools or magnet programs in different schools. It seems to me that that would be a marked departure from any kind of remedial suggestion which has been made heretofore.

Magnet school concepts are ones where the localities create and establish these magnet school programs or enhanced programs which can indeed assist in achieving desegregation.

Senator **Baucus**. OK. My time is up. I want to thank you very much for adjusting your schedule and allowing me to interrupt your statement. I appreciate that very much.

Thank you, Mr. Chairman.

Senator **East**. Thank you, Senator Baucus.

Mr. Reynolds, I gather you prefer as a matter of choice to finish your statement?

Mr. **Reynolds**. I think, now that I have started it, I probably ought to finish it.

Senator **East**. All right. It would be made a permanent part of the record, as written; but I am not trying to stop you from doing that. If you feel more comfortable doing it, I certainly would want you to do that; but your full statement will be made a part of the permanent record and would certainly reflect, as we understand, your position as coming from the Department of Justice. But I leave that decision to you, because I do not want you to feel that we have cut you off.

Mr. **Reynolds**. I believe it would be most appropriate, since I am half-way through it, to continue with the statement, since I am not sure there are enough copies available for other people who are listening, and they would be left without the benefit of the remaining part.

Senator **East**. That is fine. Please feel free to continue.

Mr. **Reynolds**. In order to make it coherent, I will back up a little.

Senator **East**. OK.

Mr. **Reynolds**. Forgive me if I repeat myself for just a sentence or two.

Few issues have generated as much public anguish and resistance, and have deflected as much time and resources away from needed endeavors to enrich the educational environment of public schools, as court-ordered busing.

The results of numerous studies aimed at determining the impact of busing on educational achievement are at best mixed. There has yet to be produced sufficient evidence showing that mandatory transportation of students has been adequately attentive to the seemingly forgotten other remedial objective of both *Brown* and *Swann*—namely, establishment of an educational environment that offers an equal education opportunity to every school child, irrespective of race, color, or ethnic origin.

In his May address to the American Law Institute, Attorney General William French Smith accurately commented on the accumulated evidence in this area in the following terms:

> Some studies have found negative effects on achievement. Other studies indicate that busing does not have positive effects on achievement and that other considerations are more likely to produce significant positive influences.
>
> In addition, in many communities where courts have implemented busing plans, resegregation has occurred. In some instances upwardly mobile whites and blacks have merely chosen to leave the urban environment. In other instances, a concern for the quality of the schools their children attend has caused parents to move beyond the reach of busing orders. Other parents have chosen to enroll their children in private schools that they consider better able to provide a quality education. The desertion of our cities' school system has sometimes eliminated any chance of achieving racial balance even if intracity busing were ordered.

These lessons of experience have not been lost on some judges, including members of the Supreme Court, where opinion in this area is now sharply divided. For example, Justice Lewis Powell recently remarked in dissent in the *Estes* case: "This pursuit of racial balance at any cost * * * is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one race schools, courts may produce one race system," *Estes* v. *Metropolitan Branches of the Dallas NAACP,* 444 U.S. 437, 450—1980—Powell, J., joined by Stewart and Rehnquist, JJ., dissenting from dismissal of certiorari as improvidently granted.

The flight from urban public schools has contributed to the erosion of the tax base of a number of cities, which has in turn had a direct bearing on the growing inability of many school systems to provide a quality education to their students, whether black or white.

Similarly, the loss of parental control and involvement, which often comes with the abandonment of a neighborhood school policy, has robbed many public school systems of a critical component of successful educational programs.

There is, in addition, growing empirical evidence that educational achievement does not depend upon racial balance in public schools.

To be sure, some communities have accepted mandatory busing, thus avoiding some of its negative effects. Unfortunately however, calm acceptance of mandatory busing is too often not forthcoming; and, plainly, the stronger the parental and community resistance, the less effective becomes a compulsory student transportation plan.

One of the principal objections to busing is that courts, frequently relying on the advice of experts, have largely ignored the measured terms of the *Swann* decision and have employed busing indiscriminately, on the apparent assumption that the cure-all for past intentional segregative acts is to reconstitute all classrooms along strict racial percentages. Not even in a perfect educational world would one expect to find every school room populated by precise racial percentages that mirror the general population.

Mandatory busing has also been legitimately criticized on the grounds that it has been employed in some cases to alter racial imbalance that is in no way attributable to the intentionally segregative acts of State officials.

In *Keyes* v. *Denver School District,* 413, U.S. 189 (1973), the Supreme Court held that a finding of State-imposed racial segregation in one portion of a school system creates a presumption that racial imbalance in other portions of the system is also the product of State action.

To avoid imposition of a system-wide desegregation plan, which often includes system-wide busing, a school board subject to the Keyes presumption must shoulder the unrealistic burden of proving that racial balance in other areas of the system is not attributable to the State.

Consequently, the application of *Keyes* has in my view resulted in system-wide transportation remedies that in some instances encompass not only de jure or State-imposed segregation but de facto segregation as well.

Sobered by this experience, the administration has reexamined the remedies employed in school desegregation cases. Stated succinctly, we have concluded that involuntary busing has largely failed in two major respects: It has failed to elicit public support, and it has failed to advance the overriding goal of equal education opportunity. Adherence to an experiment that has not withstood the test of experience obviously makes little sense.

Accordingly, the Department will henceforth, on a finding by a court of de jure racial segregation, seek a desegregation remedy that emphasizes the following three components, rather than court-ordered busing: one, removal of all State-enforced racial barriers to open access to public schools; two, insurance that all students—white, black, Hispanic, or of any other ethnic origin—are provided equal opportunities to obtain an education of comparable quality; and, three, eradication to the fullest extent practicable of the remaining vestiges of the prior dual systems.

To accomplish this three-part objective, we have developed, I think, a coherent, sound, and just litigation policy that will insure fair enforcement of the civil rights laws, eliminate the adverse results attending percentage busing, and make educational issues the foremost consideration.

As part of that litigation policy, the Department will thoroughly investigate the background of every racially identifiable school in a district to determine whether the racial segregation is de jure or de facto.

In deciding to initiate litigation, we will not make use of the *Keyes* presumption but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of State officials.

All aspects of practicability, such as disruption to the education process, community acceptance, and student safety, will be weighed in designing a desegregation remedy.

In developing the specific remedial techniques to accomplish this three-part objective, we recognize that no single desegregation technique provides an answer. Nor does any particular combination of techniques offer the perfect remedial formula for all cases.

But some desegregation approaches that seem to hold promise for success include voluntary student transfer programs, magnet schools, enhanced curriculum requirements, faculty incentives, in-service training programs for teachers and administrators, school closings in systems with excess capacity and new construction in systems that are overcrowded, and modest adjustments to attendance zones.

The overarching principle guiding the selection of any or all of these remedial techniques, or indeed resorting to others that may be developed, is equal education opportunity.

Let me add that our present thinking is to give this approach prospective application only. We do not contemplate routinely reopening decrees that have proved effective in practice.

The law generally recognizes a special interest in the finality of judgments, and that interest is particularly strong in the area of school desegregation. Nothing we have learned in the 10 years since *Swann* leads to the conclusion that the public would be well served by reopening wounds that have long since healed.

On the other hand, some school districts may have been successful in their efforts to dismantle the dual systems of an earlier age. Others might be able to demonstrate that circumstances within the system have changed to such a degree that continued adherence to a forced busing remedy would serve no desegregative purpose.

Certainly, if in the wake of white flight or demographic shifts black children are being bused from one predominantly black school to another, the school system should not be required to continue such assignments.

A request by the local school board to reopen the decree in such circumstances would in my view be appropriate, and the Justice Department might well not oppose such a request so long as we are satisfied that the three remedial objectives discussed above will not be compromised.

There is another dimension to the administration's current school desegregation policy that deserves mention. Apart from the issue of unconstitutional pupil assignments, experience has taught that identifiably black schools sometimes receive inferior educational attention.

Whatever the ultimate racial composition in the classroom, the constitutional guarantee of equal education opportunity prohibits school officials from intentionally depriving any student, on the basis of race, color, or ethnic origin, of an equal opportunity to receive an education comparable in quality to that being received by other students in the school district.

Deliberately providing a lower level of educational services to identifiably black schools is as invidious as deliberate racial segregation. Evidence of such conduct by State officials might include disparities in the tangible components of education, such as the level and breadth of academic and extracurricular programs, the educational achievement and experience of teachers and administrators, and the size, age, and general conditions of physical facilities.

Indeed, *Swann* itself held that, independent of student assignments, where it is possible to identify a black school "simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the equal protection clause is shown." 402 U.S. at 18.

The Court explained that the proper remedy in such cases is to "produce schools of like quality, facilities, and staffs." *Id. at 19.* Despite the recognition of this constitutional right by a unanimous Court in *Swann,* suits have rarely been brought to redress such wrongs.

In pursuing constitutional violations of this kind, the Justice Department in no way intends to second-guess or otherwise intrude into the educational decisions and policymaking of State education officials. That function, as I have previously made clear, is reserved to the States. And in many cases substantial disparities in the tangible components of education may well be attributed to legitimate, racially nondiscriminatory factors.

But when such disparities are the product of intentional racial discrimination by State officials, can it seriously be maintained that the educationally disadvantaged students are being afforded equal protection of the laws? Our future enforcement policies will be aimed at detecting and correcting any such constitutional violations wherever they occur.

In sum, the administration remains firm in its resolve to ferret out any and all instances of unlawful racial segregation and to bring such practices to a halt. We do not believe that successful pursuit of that policy requires resort to a desegregation remedy known from experience to be largely ineffective and, in many cases, counterproductive.

The school desegregation bills currently being considered by this subcommittee suggest a similar attitude on the part of Members of the Senate. To the extent that those bills seek to restrict the use of mandatory student transportation as a tool of school desegregation, they reflect the thinking of the administration in this area.

I would sound only one cautionary note. In framing legislation aimed at eliminating or severely limiting the use of forced busing as an available remedial tool, care should be taken not to draft the statutory prohibition so broadly that it bans as well other desegregation techniques which have not been shown to be ineffective or counterproductive in combating State-imposed racial segregation of our public schools.

In this regard, a legislative prohibition against inferior Federal courts ordering transportation of students to obtain racial balance in the schools need not, in our view, also preclude use of other remedial techniques such as school closings in systems with excess capacity or involuntary transfers of teachers to break up State-created racially identifiable faculties.

The evidence currently available to the Department of Justice indicates that school closings and teacher transfers may in some cases assist effectively in eliminating the vestiges of racially discriminatory dual school systems.

Nor does the Department have information suggesting that these desegregation techniques are attended by any of the adverse consequences often associated with mandatory student transportation.

Accordingly, we would hope that the subcommittee, in its consideration of appropriate antibusing legislation, would hesitate before eliminating desegregation methods which, unlike mandatory busing, have been usefully employed in the past to assist in vindicating the constitutional guarantee of equal education opportunity for all public school students, regardless of race, color, or ethnic origin.

In closing, let me state that this administration will tirelessly attack State-imposed segregation of our Nation's public schools on account of race, color, or ethnic origin. The Department's mission continues to be the prompt and complete eradication of de jure segregation.

While the relief we seek may differ in certain respects from the remedies relied upon by our predecessors, the Department of Justice will not retreat from its statutory and constitutional obligation to vindicate the cherished constitutional guarantee of equal education opportunity.

Thank you, Mr. Chairman.

Senator **East**. Thank you, Mr. Reynolds.

Before I turn to a question or two that I have of you, Judge McMillan, again I wish to thank you for coming and would be delighted to have you stay as long as you would like.

I am afraid, because of our time constraints, and with the absence of our two distinguished colleagues here, we will not be coming back to your testimony.

I would appreciate it if you would be available for written questions that might be sent to you in the near term from any member of the panel.

Again, we would be delighted to have you stay; and I appreciate your indulgence in remaining as long as you have; but I know you have scheduling problems also; and we will not indulge upon you any further.

Judge **McMillan**. Mr. Chairman, my staying power might be affected by the endurance power of my grandchildren.

Senator **East**. We appreciate your willingness to stay this long, and want to say that you can stay as long as you would like and leave whenever you feel compelled to do so.

Again, Mr. Reynolds, I would like to thank you for coming and indulging our time problems which we always seem to have here in the Senate.

Let me just get a clarification on a couple of points which, at least for me, will be all I have of you. As I understand, what you are saying is that your general policy in the Department of Justice, as a general policy, is one in which you are concluding that mandatory busing for purposes of achieving racial balance or proportions is a remedy you no longer find an acceptable remedy for the various reasons you have given.

You have very carefully stated—so I do not, obviously, wish to put words in your mouth—that you feel there are other appropriate and desirable remedies to deal with the problem of the matter of desegregation or however one wishes to describe this matter of implementing rights, regardless of race, under the Constitution. But the administration has come to the conclusion that mandatory busing for purposes of achieving racial balance is an inappropriate tool to the desirable end—namely, a racial neutrality and a colorblind Constitution. Am I correct in that understanding?

Mr. **Reynolds**. That is correct.

Senator **East**. And I understand this: You are not endorsing this bill, per se, as you say you are not here in that capacity, because the Department of Justice has not yet completed its own evaluation on this question of the withdrawal of jurisdiction. So you are not here to comment upon that, and the Department itself is, as of this point, not in a position to comment upon it.

But in terms of the end that we hope to achieve, we are not at least pointing in a direction that is inconsistent with administration policy in the Department of Justice. Is that correct?

Again, it is another way of restating my premise that if, for purposes of discussion, which you are not conceding at this point, we could assume this is a constitutional remedy, you have no quarrel with what we are trying to achieve?

Mr. **Reynolds**. That is correct.

Senator **East**. But you are reserving the right to evaluate the particular method. I fully appreciate that and understand it.

Indeed, I would argue, simply as one Senator, and do not pretend for a moment to speak for the balance of my colleagues here, let alone the U.S. Senate; but I was noting earlier in my exchange with Senator Baucus that we are always delighted to hear from our distinguished colleagues from the Justice Department; but I do feel as a matter of separation of powers we have an obligation to pursue remedies as we see fit, to explore them, and to examine them. We can do that on our own initiative and indeed ought to do it, always of course concerned and solicitous of comments offered by our coequal branches, or relatively coequal—regarding here the Justice Department as the executive branch.

I do not personally find it imperative and absolutely essential before we can make up our minds on a remedy or course of action that we must have been given a definitive, authoritative decision by the executive branch. Again, we have our own obligations to pursue under the Constitution, and, at appropriate times, whenever the executive branch sees fit to offer their thoughts, we will happily receive them, weigh them, and consider them very carefully.

I do not feel that that is a condition precedent to our pursuing courses of action as we reasonably see them and understand them.

Again, on the point that Senator Baucus was making to you, I do not look upon the Justice Department as having been delinquent here for dragging their feet, simply because this branch of Government has not pressured you, that I am aware of—we certainly have not—to give us a definitive ruling.

If we had a week, a month, or 6 weeks ago, then we might chide you a bit for being dilatory; but since we have not done that and you have not offered a gratuitous opinion, I suppose there is a mutuality of respect there at this point. But you are certainly free to do what you wish in the future.

So I do not see then, as our exchange here would suggest that what we are doing, at least as a policy goal or end, is inconsistent with the general policy concerns of the Department of Justice, but, again, appreciating you have the right to offer your judgment on any particular remedy that we might come up or with some particular legislative form.

Finally, I completely accept your good caveat that whatever we do draw here—and we have tried to be very careful on this point and happily received advice on it from many quarters, public and private—I would remind those following this matter that this bill is so tailored as to single out a particular thing—namely, mandatory busing for purposes of achieving racial balance—that is the particular mischief or—if you will—evil that we are trying to deal with.

It is quite clear that the lower Federal courts, let alone other entities of the American Federal system, would have adequate tools and remedies to deal with a whole phalanx of possible remedies for the problem of achieving greater racial fairness and equity under the U.S. Constitution, as that standard may evolve over time.

I am simply trying to put in perspective that this is a slender point dealing with a specific problem—namely, court-ordered busing for purposes of achieving racial balance.

It leaves untouched and unscathed the power of the lower Federal courts to deal with an infinite number of other potential remedies they might have in confronting this problem.

Unless you have an additional comment, Mr. Reynolds, I have nothing else to inquire of you. I again thank you for coming.

We have one final panel here, which we fully intend to hear. The chairman being of mortal flesh, I am going to ask that we take a 10-minute recess. I shall return, I promise; and we shall proceed with our final panel.

Mr. REYNOLDS. Thank you, Mr. Chairman.

Senator EAST. Thank you. We will recess for 10 minutes.

[A short recess was taken.]

Senator EAST. I would like to declare us to be back in session. I would appreciate it if the panelists who are here would please take their seats: Mr. Tom Atkins, Ms. Carolyn Hutto, Ms. Suzanne Hittman, Mr. Herb Rule, and Ms. Jane Scott.

I appreciate the patience of you good people, having been here for so long. We certainly want to give you an opportunity to be heard.

As we have traditionally done here with panels of this sort, I would like to let each of you make your statement; and then we can come back and have a discussion based upon the whole range of comment rather than just do one on one along the way; it seems to string it out unduly long.

This way, if any of you is under an incredible time bind, you can leave; and I will happily stay with the rest of you so we can finish up this line of testimony.

Again, I would encourage you to be as concise as you can in terms of your oral statements, in generally stating your conclusions and basic reasons therefor, appreciating that your full statements will be made a part of the record. That will leave all of us more time for a little dialog.

I welcome Mr. Tom Atkins, general counsel for the National Association for the Advancement of Colored People, from New York, N.Y. I welcome Ms. Carolyn Hutto, a former member of the Jefferson County Board of Education, Louisville, Ky.; Mrs. Suzanne Hittman, president of the Seattle school board, from Seattle, Wash.; Mr. Herb Rule, president of the Little Rock school board, Little Rock, Ark.; and Mrs. Jane Scott, a former member of the school board, Charlotte, N.C.

It is nice to have you, Mrs. Scott, a constituent. We again welcome all of you.

Mr. Atkins, if you would like to kick off this session; we will just move down the line and then get in our discussion.

Mr. Atkins.

STATEMENT OF TOM ATKINS, GENERAL COUNSEL, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NEW YORK, N.Y.

Mr. **Atkins**. Thank you very much, Senator East. I appreciate the opportunity to appear before the subcommittee and offer some observations.

I must say, Mr. Chairman, sitting through the earlier parts of this session suggests to me that there is much to do and very little time in which to do it, both for this committee and perhaps for the country.

My remarks, in deference to the tightness of the subcommittee's time schedule, will be brief. I will not read my written statement, which has been made available to the subcommittee, with the exception of the last 2 pages which I lost in transit and I will send to the subcommittee. I apologize for their absence.

I will summarize the written statement very quickly and make some additional comments, if that is OK, Mr. Chairman.

Senator **East**. That is fine.

Mr. **Atkins**. The bulk of my written statement addresses, in the context of four specific cities that have been under and are now under Federal court desegregation orders, the specific proposed findings contained in section 2. Those cities are Boston, Detroit, Columbus, and Cleveland.

In each of those cases, I was counsel of record for the plaintiffs. I researched the cases and tried them in the courts. I have with respect to each of them argued in them in a court of appeals, and with respect to the *Columbus* case argued it in the Supreme Court.

My comments then reflect not just what those courts found but what I found in the course of my personal experience litigating those cases.

I should also say that I have been counsel of record in either two or three dozen school desegregation cases, and I frankly do not remember at this point, and am responsible for supervising a considerably larger number of school desegregation cases. That experience also both colors and informs my comments.

With that as a backdrop, I would say that with no exceptions the findings as they are currently and presently written in this legislation cannot stand the test of facts.

Finding No. 1, suggesting that school desegregation assignment has been the cause of greater separation of the races by causing flight from the school districts or from the cities in which these school districts are located, is a frequent assertion. It is undocumented.

The efforts of those who have made such statements, including reference earlier by one of our previous speakers—I believe, Senator Helms—to Professor Coleman—almost all of those studies have been discredited, including that particular one.

Mr. Coleman's study was based on a universe that included cities that had never engaged in any kind of desegregation, voluntary, State ordered, Federal ordered, court ordered, or administrative agency ordered.

Mr. Coleman included, for instance, New York City as one of the cities that had experienced rapid loss of student enrollment. Philadelphia was another one. Chicago was a third. None of them has been through a school desegregation. Chicago indeed, right now, is in the midst of a school desegregation case which has not resulted in any desegregation orders nor any desegregation.

The point I make, Mr. Chairman, is that with reference to the theory behind No. 1, that school desegregation is somehow the cause of flight—black, white, or yellow—it is a bankrupt theory. There are no facts to support it. It is a nice assertion, but it is not borne up either by fact in the cities in which there have been school desegregation cases nor by studies that have been done by independent observers and researchers.

With reference to the four specific cities of which I spoke earlier—Boston, Detroit, Cleveland, and Columbus—it would have been difficult for school desegregation to have improved upon the racial separation that exists. In Cleveland it was almost statistically perfect. In Boston it was almost statistically perfect, and Detroit the same. Columbus was somewhat less racially separated. That is to say, blacks were found in a larger percentage of the city.

It would be difficult for anyone to review demographic figures—distribution of population—and conclude, even with respect to the city or with respect to the school system, that desegregation had caused racial separation to increase. That is simply not the case. It certainly was not the case with respect to the school systems themselves, which were racially segregated—not separate, but racially segregated by the actions of the public officials.

There have been disenrollments of children from public school systems. It is a phenomenon that has been going on for at least the last 60 years, as recorded by the Census Department, by demographers public and private, and it has happened in school districts with or without school desegregation plans.

There has been some measurable increase in school districts where there have been school desegregation plans, but usually only where there has been public resistance which caused uncertainty and raised the specter of violence. That has been the key factor, in my experience.

I would suggest to the subcommittee that proposed finding No. 1 will have difficulty basing itself on fact.

No. 2—that school desegregation fails to account for social science data indicating racial and ethnic imbalance, often the result of other economic and sociological factors—simply misunderstands, distorts, and misstates the nature of the school litigation process.

It is impossible and it is impermissible for any Federal court in this country today to base a school desegregation order on the mere presence of racial imbalance. That, in and of itself, Mr. Chairman, is not illegal. It is not unconstitutional under any Supreme Court decision, and any Federal court that based the decision solely on the presence of racial imbalance would be reversed.

No Federal court decision on school desegregation from *Brown* up to and including the present—not a single one, all of which I have read—is based on the presence of racial imbalance. They are based on the presence of racial segregation—that is to say, racial isolation, separation, and imbalance, which has been the result of public action. Only if the imbalance can be shown to be segregation—that is to the say, the result of public action—does the Federal court have any jurisdiction to enter a remedial decree.

So the fact that school desegregation fails to account for other social science data in cities that have not been brought to court is irrelevant. The question is whether or not, in those instances where a school system is on trial for having deliberately caused racial segregation, the facts are brought forward and the case is proven.

I would submit to you, Mr. Chairman, that it is not possible today under Supreme Court standards for a Federal court to issue a remedial decree other than after a finding of deliberate, purposeful, and effective racial segregation by the public officials.

Therefore, finding No. 2, if accurate—and I do not think it is—is not relevant in the context of prevailing and controling legal precedence.

Finding No. 3—that desegregation is not reasonably related to achieving a compelling governmental interest—represents a political statement, again not related to the flow of the cases or the facts on which those caselaw decisions have been based.

It, as well as several other findings, suggests that school desegregation can be achieved and dual systems can be effectively dismantled even with courts being barred from reassigning or assigning students after a finding of unconstitutional behavior. It is an interesting notion. It simply has not support in fact.

For this committee or any other committee of Congress to think that a Judge McMillan or other judges in the Federal court system sit around waiting for an opportunity to put some other yellow school buses on the street is naive. Those judges live in the same communities in which you live. They go to the same churches, walk the same streets, visit the same stores, and they know people do not like this as a remedy any more than they like income tax, which you also impose on us and make us pay.

But they also know that they have a constitutional obligation where unconstitutional behavior has been proven to take action that is effective in eliminating the constitutional violation.

This finding suggests that student assignments, where racial segregation caused by public action has been proven, is not reasonably related or necessary. It is most certainly necessary in some instances—not all. Usually those instances, Mr. Chairman, are in the North. In the South you did not have as much residential segregation as in the northern and western communities. That is one of the reasons that, to a greater extent, school districts in the South have been able to desegregate with less use of student reassignment accompanied with transportation.

In the northern communities, residential segregation caused by public action has been much more complete and much more of a factor. To suggest that use of some of these other techniques that are presumed in here is going to undo massive segregation of the type we find in Cleveland—in east Cleveland, and west Cleveland, with the Cuyahoga River running right down in the middle, and on the east side are blacks, on the west side are whites, with little exception either side—to suggest that that factual phenomenon resulting from public action is going to be undone by wishes is to misunderstand and to misstate the realities of American life today.

It is certainly related to the achievement of the constitutional objective, because two things have happened: One, there has been a violation; and, second, there is a default by public officials in correcting the violation.

The Federal courts, after they find a violation, have to wait to see if the public officials can and will correct the problem. If they do not, then, but only then, does the court have to fashion the decree as well as order that one come forward.

I will not, Mr. Chairman, go through each of these specific findings. I have attempted to do that in my written statement. I would hope—even though it disagrees, Mr. Chairman, with some of your earlier statements, and maybe some of your beliefs, and certainly some of these suggested provisions—you would read that.

I will be available to come back at a time when you or your staff or the subcommittee has more time. So I will not impose at this moment on that opportunity.

I have some other things I would like to say before I close: I think, as you have heard today from the Assistant Attorney General in charge of the Civil Rights Division, what this administration views its obligations to be, that—when combined with what this subcommittee is now considering doing, and what other committees of the Congress in this the Senate and the House side are considering doing—represents in my view and the view of the organization I represent a shameful specter.

We see here today a committee of the U.S. Senate poised to act on legislation which would take from black Americans and other minority children one of the single most effective things ever to have been done to liberate them from the slavery traditions on which much of this country was based. This committee and this bill is poised to turn back that clock.

We hear the Assistant Attorney General say to this committee, "We have made a political decision to ignore the separateness that prior racial discrimination has caused and have made a political decision to focus on the inequality of that separateness."

He was correctly asked by Senator Baucus whether or not that was not strangely reminiscent of *Plessy* v. *Ferguson*. It is precisely what *Plessy* v. *Ferguson* was all about and what Brown in 1954 struck down.

As I read through the statement of the Assistant Attorney General, I see that it betrays an embarrassing lack of knowledge about the facts of school desegregation cases, including cases brought by his Department, by his division, and by lawyers under his present jurisdiction and supervision.

Had he read the facts on file in his office, he would not have made some of the statements he has made here today, such as suggesting that there have not been in the prior school desegregation lawsuits of remedial consideration efforts to address inequality—physical inequality—buildings, supplies, materials, and so forth. That is simply not true, Mr. Chairman.

If one reads *Milliken II*, the case dealing with Detroit, which came down in 1977, one sees that that case has to do not only with the question of inequality but with some of the very difficult ways the courts have had to follow in trying to address it.

The *Boston* decision addresses inequality—a range of educational programs. The *Cleveland* decision addresses inequality—a range of educational programs. The litigation, the trial itself—many days were spent in each of those courtrooms dealing with the fact of educational inequality and inequality which was demonstrated to be a function of, not separate from, the racial segregation.

I would certainly hope this subcommittee would reconsider trying to do what this legislation tries to do.

In my view, it is unconstitutional; and I would on that score identify myself totally with the remarks made earlier, I believe to this subcommittee, Mr. Chairman, by J. Harold Flannery at an earlier session. I have read his remarks, and I agree totally with them. When I do send you the last two pages of my statement, you will see that it reflects that to some extent.

I would also hope that the subcommittee would, if it does feel there is need to address this subject in some way, approach it from the standpoint of what can the Congress do that will be helpful.

It will not, Mr. Chairman, be helpful for the Congress to become yet another obstacle in the path of black and other minorities trying fully to come under the four corners of the U.S. Constitution. That is what this bill will do.

You will be a defendant in a lawsuit. You will be an obstacle in the path away from a shameful part of this Nation's history. You will not contribute to the social peace and racial harmony which this bill posits as one of its concerns, and I think correctly so. You will become part of the problem, not part of the solution. It does not fit the stature of this Congress to do that.

I plead with you, Mr. Chairman, notwithstanding there is obviously a certain sense of pride of authorship, to reconsider.

Senator East. Thank you, Mr. Atkins. I appreciate your statement.

Mr. Atkins. Mr. Chairman, I am going to have to leave. I apologize for having to do that. I will respond to any questions you have, but I cannot wait for the entire session to be completed.

Senator East. I appreciate that. I will tell you what we could do, as we have done with Judge McMillan. If there are members of the panel who would like to submit questions in writing to you, they can send them too, and then that can be made a part of the record.

Your full statement, including the two pages that you say are not with you at the moment, will of course be made a part of the record.

So I think, Mr. Atkins, appreciating the time pressures we all work under, that is probably the best way to handle it. How would that be?

Mr. Atkins. Thank you very much, Mr. Chairman. That is fine. I will respond.

Senator East. Fine. Thank you.

Ms. Hutto?

STATEMENT OF CAROLYN HUTTO, FORMER MEMBER, LOUISVILLE SCHOOL BOARD, LOUISVILLE, KY.

Ms. HUTTO. Senator East, for the record, I need to have a correction made. I am not now a member of the Jefferson County Board of Education. My term expired in December 1978.

Senator EAST. The record will then show that you are a former member of the Louisville School Board. Would that be accurate?

Ms. HUTTO. Indeed, that is so. And then I became a member of the merged board—the Jefferson County Board of Education.

Senator EAST. Fine.

Ms. HUTTO. Senator, I have heard your admonitions to summarize and be brief. I believe what you say when you send us out notices, so I wrote this in order to keep from rambling. It is tight, and it is 5 minutes.

Senator EAST. That is fine. Go right ahead. I shall be impressed with a 5-minute presentation.

Ms. HUTTO. My name is Carolyn Hutto. I am from Louisville, Jefferson County, Ky. My purpose here today is to tell you an important success story.

First though, I must provide a little historical and sociological background. I was reared in Louisville. I attended public schools, grades 1 through 12. I went away to college at Vanderbilt University and returned 4 years later to teach, marry, have three children, and teach again.

During all these years of which I speak, all these years of being educated and educating others, I never discussed an idea with nor had a simple conversation with a black person. In fact, it was not until I was 40 and became a member of the Louisville School Board that such an enriching opportunity arose for me.

The three Hutto children, now 22, 20, and 12, have been fortunate enough to experience to one degree or another an integrated schooling situation. They are, in their views and their parents' view, much the better for it.

Let me briefly tell you their stories, because in many ways it is reflective of school desegregation in Jefferson County. I would add that this is the first time that I ever spoke personally and generalized from the personal when I have spoken in public in a capacity such as this.

In September 1975, Jefferson County public schools opened with a desegregated school population by virtue of a sixth circuit Federal Court of Appeals order in July of that year.

At this time, our eldest child, Peter, was beginning his last year of high school in the school that I had attended. He was senior class president. He was not interested particularly in school desegregation. He did not dislike the idea especially; he just had not thought much about it. If he had been asked to comment in the fall of 1975 about school desegregation, he might have said he did not care a whole lot for it because it was an inconvenience and an occasional hassle. It required adjustment and change.

But Peter was an elected leader, and he wanted to be a good one. He worked hard all that year at providing positive, responsible leadership for his class and his school. Today he believes that the experiences of his senior year were valuable, insightful, and pragmatically beneficial.

At the same time, in the fall of 1975, Andrew Hutto, grade 10, found himself in quite another situation. Andrew had been looking forward to entering his brother's high school; and, if the truth be known, he thought he too might be senior class president. This was not to be. Due to the desegregation plan, our street was redistricted to another school's attendance zone.

As a result of this, Andrew entered 10th grade with few students he knew and all the hopes he aspired for dashed in his estimation. He was deeply disappointed.

As the year wore on, he became disgusted with the behavior of many pupils in his school, both black and white. School was fatiguing, and it was lonely for him. After a while though, he pulled himself together and entered into the spirit of his new school. He became senior class vice president. He tried to organize student activities; much of that did not work.

In spite of all the disappointment, early tension, and loneliness that Andrew felt for a year or so, he said to me, standing in our kitchen at Christmas of his senior year, "I would not take anything for these past 3 years. I've learned so much. I feel sorry for kids who haven't experienced what I have."

In the fall of 1975, Chloe Hutto, age 7, was greatly anticipating her senior grade year. She boarded the school bus at her neighborhood school, rode half an hour across town to her newly assigned desegregated school, and loved every minute of the ride. She went into a fairly nice classroom in an old, ugly school, to be educated by a thoroughly competent teacher.

Chloe had a very good year during that first year of school desegregation; and her years of schooling since have been sufficient to maintain and support her interest in learning, which is considerable. It would be astounding, perturbing, and quite unacceptable to her to be educated in anything other than a desegregated setting.

In 1975 I was a member of the Louisville Board of Education which in April merged with the Jefferson County Board of Education. From time to time people then and now ask about school desegregation: "Is it working?"

It is hard to know what people really mean when asking that question. Children are going to school, many are learning; some are not. Teachers are working. Many are teaching; some are not.

In spite of initial, ugly protesting on the part of some antibusers and in spite of failure on the part of leaders to plan sufficiently for both community acceptance and for the education of children, Jefferson County schools never had to be closed because of racial tension or violence—never. Further, and most importantly, studies done of this community by others and the school system's own data reflect the following:

With regard to white flight, relatively few families moved out of Jefferson County as a reaction to desegregation, and those that did move did so over a relatively short period of time. The loss of white students in Jefferson County was primarily due to declining birth rates and out-migration already well under way at the time of the order.

The year the plan was implemented, there was a sharp drop in enrollment of white students and a corresponding increase in parochial/private school enrollment; but by the end of 1977 the loss rate returned to that expected prior to the desegregation event and remains there.

This is from the final 1979 report of the Jefferson County Education Consortium, "The Impact of Court-Ordered Desegregation on School Enrollment and Residential Patterns in the Jefferson County Kentucky Public School District."

With regard to changes in housing patterns to more integrated neighborhoods, between 1974 and 1977 there was an 86-percent increase in the number of black pupils—2,154—in white suburban areas. This represented 8 percent of all the black pupils in the school system and is a significant move toward more integrated neighborhoods, therefore resulting in less busing rather than more.

This is from the 1977 report of the Kentucky Commission on Human Rights, "Housing Desegregation Increases as Schools Desegregate in Jefferson County."

Test scores are improving for black and white children. The Jefferson County public schools have given a standardized test to every child each of the last 6 years, and the trends are very clear. The scores have improved each year at virtually every grade level for both black and white children, and the district as a whole is scoring at the national norms. In most cases the increases are more dramatic for black children than for white children, but it is clear that children are learning.

In 1979–80, black first graders who had been in only integrated school situations scored near the national norm. White students are doing as well as or better than in prior years, but the gap between black and white achievement as measured by standardized test scores is closing.

With regard to the decline in school disruptions and suspensions, the suspension rate was very high in Jefferson County in 1975–76, and black students accounted for a disproportionate number of suspensions. This was caused in part by the merger of two districts and conflicting policies and procedures. Students, both black and white, did not understand the norms for behavior in new situations.

This number has declined significantly since 1976, and in 1980–81 there were fewer suspensions and black students represented a smaller portion of the total.

As an important political indicator—and I think this is key in a way—it must be stated that school board elections held in Louisville—Jefferson County, Ky., in 1977 and in 1979 did not center on the issue of school desegregation. Further, the current elections of 1981 do not. Additionally, it should be stated that these last three elections have received more public interest in terms of knowledge of candidates and what they stood for, financial support, and voter turnout.

Six years ago, in the fall of 1975, I appeared before the Senate Judiciary Committee which was taking testimony on a constitutional amendment that would eliminate busing as a means for desegregating schools.

At that time I said, "The real issue before the committee is not the busing of children for whatever purpose but rather how our society will insure the constitutional rights of all its citizens, including 34 million minority citizens of this country."

Today I appear before this subcommittee to urge that it not support the bill under consideration. It appears to me, as a former board member, that it tampers with powers our founding fathers reserved to State and local school boards with regard to pupil and teacher assignment and the administrative decisions and mechanics of transportation.

Further, it appears to undermine constitutional principle by divesting lower courts of their power in the realm. In fact, it appears to me that this legislation attempts to achieve indirectly what the proponents of a constitutional amendment could not do directly—that is, withdraw constitutional jurisdiction from lower Federal courts.

Finally, as you struggle toward a vote on the Neighborhood School Transportation Relief Act, I ask that you exercise the leadership vested in you by looking forward, not backward, to a time when all of our children can have equal access to a good education regardless of their roots.

I ask that you vote against this bill, which would not only make future desegregation efforts more difficult but one which would allow the revision and possibly dismantling of desegregation in communities such as Louisville where it is working.

Thank you.

Senator **EAST**. Thank you, Ms. Hutto.

Ms. Hittman?

STATEMENT OF SUZANNE HITTMAN, PRESIDENT, SEATTLE SCHOOL BOARD, SEATTLE, WASH.

Ms. **HITTMAN**. Mr. Chairman and the absent members of the subcommittee, I am proud to be able to present to you today Seattle's experience with school desegregation.

Seattle was mentioned earlier as to the fact that we have "upset people" in Seattle. I am sure we do, as we have in every community over a variety of issues. But I think the facts I will present to you today are very substantive that we have some very good support from our residents as well.

Currently before the subcommittee are several proposals to limit student assignment and transportation for desegregation. One, S. 1647, seeks to limit only court-ordered desegregation. Another, S. 1147, would by its terms prevent not only Federal court-ordered busing but also desegregation plans which are adopted by local school districts and even plans which rely solely on voluntary reassignments.

Based on Seattle's successful experience with desegregation, we believe that the Congress should take no action which would interfere with the ability of local school districts to desegregate their schools through local initiative and with local control or which would impair their incentives to do so.

I have attached to my testimony documents specifically addressing the findings of the proposed measures. Seattle's experience supports none of them.

My following comments are just a brief overview of those specific comments, and I am sure you will relate them back to the findings in your bill.

The Seattle School District instituted a systemwide desegregation plan in the fall of 1978. Adoption of the Seattle plan followed 15 years of unsuccessful attempts to desegregate Seattle's school system using all possible voluntary methods, from voluntary transfers with free transportation to an extensive magnet schools program.

Between 1963, when voluntary desegregation efforts began, and 1977, the last year before the Seattle plan, racial imbalance grew steadily worse. The number of segregated schools and the degree of segregation within schools increased. Moreover, minority students bore a greatly disproportionate share of the burden of movement, since few whites volunteered.

The Seattle School Board and community leadership in Seattle have had a long-term commitment to school desegregation. When it became apparent that the best voluntary efforts possible were not capable of desegregating Seattle's schools, a local consensus formed to desegregate without court intervention.

Local business leaders, religious leaders, political leaders, and civil rights organizations jointly urged the Seattle School Board to implement without court direction a locally developed and controlled desegregation plan.

The school board responded in three ways: One, we adopted a definition of racial imbalance—minority enrollment at any school more than 20 percent above the districtwide minority percentage; two, we required that desegregation occur through educationally sound strategies; and, three, we initiated a 6-month process of citizen planning activities, which culminated in December 1977 with adoption of the Seattle plan for elimination of racial imbalance. Local media have been strongly supportive of Seattle's efforts to maintain local control of this issue.

The Seattle plan relies on roughly equal numbers of mandatory and voluntary student reassignments to accomplish desegregation of the schools. Where voluntary strategies appear incapable of achieving desegregation, elementary schools are desegregated by joining together the populations of two or three neighborhoods in "pairs" or "triads."

For example, students from both neighborhoods in a pair attend school together, first in grades 1 through 3 at one site and then in grades 4 through 6 at the other site. Thus, students are assigned on the basis of their neighborhood and not individually on the basis of race.

Students brought together in the elementary grades remain together at the secondary level. Neighborhood students stay together throughout their school careers if they so choose, and students have predictability and stability in their assignments—both factors which Seattle citizens indicated were important in any desegregation plan.

Equity of movement is a key feature of the plan. Roughly equal numbers of minority and majority students participate. Parents and students have the opportunity to select voluntary alternatives to their initial fixed assignments, which has no doubt enhanced community acceptance of the plan. Educational options include both program content and teacher style alternatives.

I have brought, Senator East, for you—and I am sure your aides would want to get them to the other subcommittee members—a copy of our Seattle plan which is sent to the parents and guardians of each student in the spring preceding the school year, so the parents can make that very kind of choice.

You will note that the forward to it is written, in addition to English, in the eight basic languages of our student body, so that everyone has the opportunity to understand and participate in our program.

Mandatory desegregation is more cost-effective than voluntary. Voluntary desegregation transportation costs over two times as much per student as mandatory, because scattered student movement is less efficient than transporting entire neighborhoods together.

Enhanced program content and staffing at magnet schools are additional expenses of voluntary programs, although with tight funding Seattle is operating its option programs at baseline levels as much as possible.

In spite of the drastic decline in Federal desegregation aid and the tremendous uncertainties of school finance generally in Washington State, Seattle will attempt to preserve this important voluntary feature of its plan.

The Seattle plan has successfuly desegregated Seattle's schools, and educational quality has been enhanced. All students now have the opportunity for a multiethnic education, which Seattle citizens believe is essential to preparing our students for this pluralistic society in which they will live.

There have been no adverse educational effects. Achievement scores have risen slightly districtwide, and in fact achievement gains in the pairs and triads appear greater than in other district schools.

The Seattle plan has not had a harmful effect on white enrollment. Before the plan enrollment had fallen steadily from nearly 100,000—over 85 percent white—in 1963 to under 60,000—65 percent white—in 1977.

In the first 3 years of the Seattle plan, the proportion of white students in the district declined roughly 3 percent per year, the same rate as in the 3 years before the plan. Had it not been for the influx of thousands of Asian immigrant students, the drop in the proportion of white students this year and last would have been closer to 1 percent. And it appears that school desegregation has played a part in slowing, and even reversing, the trend toward greater residential segregation in some portions of the city.

Seattle has adjusted peacefully to desegregated schools. At the last local property tax levy election, a near record rate of voter approval—roughly 80 percent—was achieved.

In the most recent school board elections—rather as Ms. Hutto pointed out—for Louisville pro-Seattle plan candidates defeated anti-Seattle plan candidates. Several efforts to stop the plan, including a state-wide initiative and recent legislative action, have been resisted successfully by the school board in the courts.

It will be noted that just the other day the Supreme Court agreed to hear the case regarding this State-wide initiative whose effect, if it were ruled constitutional, would be to create segregated schools in the city of Seattle.

Last spring, after a lengthy process of citizen involvement, the Seattle School Board adopted a 3-year plan of school closures and complementary changes in the desegregation plan. Continued local control of desegregation has permitted modifications in the plan to be made without any disruption to the stability that our parents want for their students.

Seattle is now prepared to make further progress. The city council and school board have jointly adopted goals calling for coordinated action to encourage residential integration. With cooperation of city, school district, and housing officials, Seattle should be able to reduce the need for mandatory assignments over the long term.

We believe the Seattle experience demonstrates how proper planning and responsible leadership can produce school desegregation that is successful educationally and successful in stabilizing a city school system.

Where elected officials do not ignore their oaths of office but instead discharge their constitutional obligations, the courts and the Federal Government need not intrude in local school governance.

Again, we urge the subcommittee to refrain from any action which would impair the ability of local school districts to desegregate with local control or which would impair their incentive to do so.

I thank you for this opportunity to present this important testimony to you about Seattle's experience, which I know you will take into a great deal of consideration.

Senator EAST. Thank you, Ms. Hittman.

Mr. Rule?

STATEMENT OF HERB RULE, PRESIDENT, LITTLE ROCK SCHOOL BOARD, LITTLE ROCK, ARK.

Mr. RULE. Thank you, Senator East.

I am Herb Rule. I am now the president of the Little Rock School Board. You doubtless have heard of us before. I hope you will hear of us more in the future but in a very positive way.

As I have studied the bills that are before you—your bill and the other two bills that were sent to me by the subcommittee staff—it has struck me that we are again engaged in a semantic subterfuge to some extent.

We are talking today, and much of the language of the bill harks back, in the language and to focusing opposition toward mandatory busing for racial balance. I have never thought that that was the issue. I have never conceived that in the experience of Little Rock we were doing anything under the order of the court or, in more recent years, on the initiative of our school board that was designed in any way to be mandatory busing of children to achieve racial balance.

What we have been doing—beginning in 1973 and 1974, after being in court for 15 years, since 1957, and having gone through the traumas of school closings and broad community disputes, dissatisfaction and distrust among the citizens of our community—is the first steps toward desegregation, the first steps that were taken on an even-handed basis throughout the entire district, the first steps which were the same in a neighborhood in the east or the south part of the town as they were in the northwest part of the town.

The board and the administration at that time began converging finally, at the order of the district court, with a plan of providing transportation as the last way—the last way after all other remedies had been tried, suggested, and discarded—to achieve desegregation in our school system.

We have at this point, I can report, not without difficulty, not without continuing problems, achieved that measure of desegregation that we feel entitles us to claim that we are running a school district in which students, regardless of race, are receiving high quality education in an atmosphere that gives them the stimulus needed to perform and achieve well in very basic areas—reading and mathematics.

Mandatory busing to achieve racial balance I am certain would receive the great plurality against it if it were put to a vote. But as I look at the bill and as I face the charge that is given to me by the voters of Little Rock, I see the problem of providing education to all children in an equal setting.

I see the duty on us to cure as best we can in good faith the spillover of deprivation and inequality that existed in my community from at least before the turn of this century. We have tools; the court has given us tools to do this, and we are doing it.

I perhaps join with other members of this panel and previous panels in taking issue both now and in my prepared remarks with the findings in the subcommittee's bill. Those may typify situations that exist in some school districts in some parts of the country; but I can say to you, I believe with certainty, that they do not represent the facts or justifiable findings in relation to the Little Rock School District.

I am worried also, Senator, about the constitutional problems with the bill. I am not, I must confess, a scholar of Federal jurisdiction or a scholar of constitutional law. My law practice deals with corporate and civil areas. I have however done some thinking and some very modest research about the question of the extent of this subcommittee's powers to define in terms of jurisdiction under article 3 and the 14th amendment what I think really relate to or substantially ought to be called the question of judicial power.

Article 3, as you know and I relearned recently, grants judicial power to the courts under the Constitution. That judicial power is vested primarily in the Supreme Court, and it includes specific mention of the equity power.

It seems to me, talking about school desegregation, that when we disassociate the power to provide a final remedy—the power to require school districts to provide busing and transportation to schools under assignment of different children—when we remove that way of really striking at the foundation of the equity court's judicial powers, we are not really talking about jurisdiction there.

It strikes me too that if we create constitutional rights as existing under the 14th amendment in this case and then impinge upon the court's powers to vindicate those rights when violations have been shown, we are in a very murky area constitutionally.

As I said at the beginning, transportation, in my view, while not popular in Little Rock, not popular in North Carolina, not popular in most of this country, has worked. It has brought, Senator East, two communities more closely together than they had ever come.

There are differences that still exist and will continue to exist, but it has brought them together more and more each day in a single concern. That concern has been for the quality of education.

Each day in my service on the board we find more parents, both black and white, concerned with the quality of the teaching that their children are getting in school, the performance that their children are experiencing in school, and with what the Little Rock School Board is going to do to improve it.

That is the type of broad community support for education and for performance in our schools that had not existed as we lived for many, many years in two separate communities.

You have a difficult decision. I think that in Little Rock, and really in the country, we are on the downhill slope. You hear calls from people throughout the country who defend what is mandatory busing to achieve racial balance. You have heard testimony today which indicated that in other areas the courts themselves, on proper motion and supported by evidence developed that relates to the specific cases like Birmingham, are ending, modifying, and reducing the transportation.

There is a point, as the *Swann* case hints in a note, beyond which schools, school districts, and public bodies have desegregated. They can go back to other forms of alinement and school assignment that do not involve busing or involve other ways.

We are moving in that direction in Little Rock, and it is my feeling that for this body to take a position which strikes at the heart of courts' power, as this one does, to grant effective relief to injured parties, as those parties in Little Rock have clearly proved they were—the effect of that will be to further undermine confidence in the institutions of this country. It will further undermine the confidence of blacks, whom I work with daily, who are vitally interested in the public schools. It will undermine their confidence that those of us in the majority in the school district will really keep the faith with them.

I thank you very much for the opportunity to appear; and I would call upon you, as you do your work in marking up the bill and considering the bill, to think of the positive things that have occurred in your experience and my experience in the 25 years that have passed since the first *Brown* case.

Thank you, sir.

Senator EAST. Thank you, Mr. Rule.

Ms. Scott?

STATEMENT OF JANE SCOTT, FORMER MEMBER, SCHOOL BOARD, CHARLOTTE, N.C.

Ms. SCOTT. Mr. Chairman, I hope being last I have not come to the end of your patience and everybody else's. I will be as brief as I can, and I would appreciate it if you would put the written remarks that I have sent you into the record in their entirety.

I represent, as you know, a different faction of *Swann* in Charlotte-Mecklenburg. I was a member of the school board from 1970 to 1976. I have been a very, very strong advocate of going back to a freedom-of-choice plan.

I strongly support the idea that people of good intention, if given the opportunity, will do the right thing by others around them without the coercion of the courts.

For some background information on Charlotte-Mecklenburg which you did not receive in earlier testimony from Judge McMillan, please bear with me; I will be as brief as I can.

In 1969, according to the court order that went to the Supreme Court, we had 106 schools, 84,542 children. We had an enrollment of 29 percent black, the rest white. We now have an enrollment of 38 percent black and 62 percent white. That has occurred within 10 years, during which we have had considerable white flight.

But the actual flight is not accurately reflected in those figures, because we were due to have 91,000 children in our school system by this time. This year we have approximately 72,000, and our enrollment continues to decrease yearly.

We are told that the decreasing birth rate is responsible for that. I do not believe it. We had a 50,000-member increase according to the census report in the last 10 years. Our private schools have grown from 6 to 30, all of them with viable enrollments. So there is white flight.

But that aside, these were the findings of the court back in 1969. I quote from the complaint, No. 12:

> That it has been judicially determined that in the Charlotte-Mecklenburg school system, each year any pupil is at liberty to request assignment to another school; that no reason for transfer need be given; and that all transfer requests are honored, unless the school to which transfer is requested is full.

I know for a fact that that was a viable policy, because I have a close friend who transferred all of her five children from a predominantly black school to a predominantly white school the year that freedom of choice was put into effect. I also have met in the last 10 years numerous others who did the same thing.

Going back to that same order, No. 13 under the complaint:

> That it has been further judicially ascertained and determined that, in the Charlotte-Mecklenburg school system, there is no racial discrimination in the expenditure of money or the providing of facilities; and no inequalities based upon racial motives with respect to the quality of teachers or books or school buildings or athletics or students; that the Charlotte-Mecklenburg schools which are apparently unsurpassed in these parts; and that the performance of the Charlotte-Mecklenburg Board in this direction has exceeded that of any school board whose actions have been reviewed in appellate court decisions.

Those were the findings of Judge McMillan, the very judge who then turned and ordered complete racial assignments on the basis of nothing but race. And we have managed to get through 10 years of it surprisingly well.

A simple thank you for our prior efforts would have sufficed in light of the fact that from 1964 to 1969, while not under court order, we, as a system, progressed from a few dozen black children attending integrated schools to over 10,000 out of 24,000 black children attending integrated schools. We were progressing with integration without the court order.

The community's reaction when the order first went through was, I guess, a combination of shock, anger, and disbelief. People said:

> They can't do that to us; there is no way a community that has been as good as ours has been, as peaceful as ours has been, as normally integrating as our has been, will have to go through this.

So it was appealed all the way to the Supreme Court, and it was upheld. Thus we have, in my opinion, our swan song.

As to violence in the schools, it has diminished. We were averaging riots every week the first 2 years. There are attachments to my report here, that I hope will also be in the record, including statements from the police chief, and significant figures from our department of security, showing what our school system went through in turmoil. Yet in no report that I have ever seen in national media have I seen that turmoil reflected accurately.

I have to ask why. If it is so good, and if we were so successful, and it was so right, why doctor the news reports?

We have gone, Judge McMillan told you this morning, through no significant problems in the school system this year. Yesterday our newspaper published the fact that 35 students in the first 6 weeks of school have been excluded from junior or senior high school for the following offenses: One student attacking a school employee, six gang attacking other students; three students committing extortion with a threat of physical harm; seven students possessing a weapon; two committing arson, vandalism, or theft resulting in loss of $100 or more, three selling drugs or alcohol, seven caught a second time this year for drug or alcohol possession, three students accused of two violations at the same time, attacking a school employee, and possessing a weapon.

None of those acts were reported in the paper until yesterday, and yet they have been occurring over a 6-week period. Again I ask, if it is all so peachy-dandy, why are these things being held back from the public?

My only conclusion can be that there are those who do not trust people of good will to do the right thing, even though the Charlotte-Mecklenburg school system has proven in the last 20 years that it would not sacrifice its children on the alter of desegregation and has stepped up its tutoring, its math labs, its reading labs, and its requests for Federal support for all the programs compensatory education would allow.

We have gone to competency testing. We no longer socially promote students. We hold them back if they are not able to get within a year or two of their grade level. We have made a stupendous effort to make this thing work.

This morning Judge McMillan told you that it has worked, and I wish you would turn with me, Senator East, since you are the only member of the subcommittee here, to attachment No. 9—the testing scores.

#9

4D The Charlotte News, Wednesday, July 15, 1981 * * * * *

COUNTY CAT TEST SCORES

(GE indicates grade equivalent)

9/30/80 Schools [illegible]	School	Total Membership 9/30/80	6th Grade	Total Reading Black GE	Total Reading Black %ile	Total Reading White GE	Total Reading White %ile	Total Math Black GE	Total Math Black %ile	Total Math White GE	Total Math White %ile	Total Language Black GE	Total Language Black %ile	Total Language White GE	Total Language White %ile	Total Battery Black GE	Total Battery Black %ile	Total Battery White GE	Total Battery White %ile
43	Allenbrook	422	6	7.1	56	8.9	76	8.0	72	8.9	87	6.4	45	9.6	79	7.3	60	8.8	86
42	Ashley Park	347	6	5.8	34	7.5	66	6.7	49	7.7	67	6.2	43	8.5	70	6.2	41	7.8	64
23	Bain	934	6	5.2	29	8.5	74	6.7	54	8.5	82	5.4	36	10.3	84	5.7	34	8.5	82
37	Barringer	770	6	5.7	37	9.1	82	6.5	46	8.7	86	6.0	42	10.8	87	6.2	41	9.0	87
43	Berryhill	518	6	5.2	25	7.2	56	6.0	36	6.7	60	4.9	31	7.5	56	5.5	31	6.9	54
43	Billingsville	462	6	6.1	29	9.8	81	6.6	47	8.7	86	6.6	46	11.6	91	6.1	39	9.0	86
56	Briarwood	758	6	6.4	45	8.5	72	6.4	42	7.8	66	6.5	52	9.5	77	6.4	45	8.0	73
38	Bruns Avenue	Center City 678	6	4.9	25	8.3	73	5.7	31	8.0	75	4.7	29	9.6	80	5.3	27	8.1	77
44	Chantilly	406	6	5.8	34	7.8	63	6.3	42	7.9	70	5.8	45	8.8	73	5.9	37	7.9	70
17	Clear Creek	709	6	4.9	25	7.9	65	6.3	40	8.0	74	5.5	36	9.5	78	5.7	33	8.0	73
39	Collinswood	381	6	6.3	44	8.1	70	8.0	72	8.5	84	7.0	54	10.1	82	7.2	59	8.4	81
23	Cornelius	544	6	5.7	36	8.1	69	6.5	45	7.8	68	5.8	40	9.3	77	6.1	39	8.0	72
35	Cotswold	429	6	6.0	40	8.6	76	6.3	41	8.3	82	6.3	44	10.4	86	6.2	41	8.7	83
38	Davidson	253	6	5.2	29	8.3	73	6.2	39	8.6	86	5.6	33	10.6	87	5.7	35	8.9	88
37	Marie G. Davis	504	6	6.0	41	9.0	81	6.3	40	8.2	80	6.3	45	10.5	85	6.1	40	8.7	83
44	Derita	763	6	6.0	41	7.9	64	6.7	50	7.9	70	6.5	47	8.8	73	6.4	45	7.9	70
38	Dilworth	580	6	5.7	37	8.3	73	6.4	42	8.0	73	6.5	38	9.4	78	6.1	39	8.0	76
40	Double Oaks	Now Closed 379	6	5.5	34	7.5	60	6.7	49	8.0	73	5.5	38	9.2	76	6.1	39	8.0	71
40	Druid Hills	475	6	5.2	29	8.3	72	5.9	33	7.7	66	5.3	35	9.6	80	5.6	31	8.0	72
24	Eastover	706	6	6.0	40	10.0	88	6.6	48	9.1	91	5.9	41	12.7	94	6.3	42	10.0	92
37	Elizabeth	489	6	6.8	51	10.2	88	6.7	51	[illegible]	84	7.7	60	12.5	93	6.9	54	9.6	90
46	Enderly Park	326	6	6.2	43	7.7	62	6.6	48	7.8	69	7.0	54	8.7	72	6.5	47	7.9	69
31	First Ward	651	6	4.9	25	9.0	80	6.2	40	8.9	87	4.9	31	10.9	88	5.5	31	9.0	87
22	J.H. Gunn	621	6	5.5	34	8.1	70	6.0	36	8.0	75	4.8	30	10.2	83	5.5	31	8.1	77
26	Hickory Grove	820	6	5.7	37	9.0	81	6.6	47	8.5	83	5.9	41	10.8	88	6.1	40	9.0	86
41	Hidden Valley	980	6	6.2	43	7.2	57	7.0	64	7.6	65	7.3	56	8.9	75	6.7	49	7.5	63
45	Highland	329	6	4.8	24	6.3	44	6.5	46	7.4	62	5.2	34	7.4	58	5.8	33	6.8	52
34	Huntersville	562	6	6.0	41	7.9	64	6.9	54	9.0	77	6.6	48	10.0	81	6.5	47	8.0	75
48	Amay James	370	6	5.7	37	8.5	74	6.7	50	8.5	84	6.6	48	10.7	87	6.3	42	8.7	84
44	Lincoln Heights	Center City 611	6	5.6	34	8.4	73	6.8	48	8.3	82	5.5	36	10.1	82	6.0	36	8.4	81
40	Long Creek	682	6	8.0	65	8.0	67	8.1	79	8.9	76	8.4	69	9.2	76	8.0	74	8.0	74
23	Matthews	932	6	5.8	37	8.8	76	6.2	36	8.0	77	6.7	50	10.7	87	6.1	40	8.8	82
23	Merry Oaks	306	6	7.7	62	8.1	70	7.2	58	8.0	73	6.7	51	8.6	71	7.1	57	8.0	74
39	Myers Park	Op. [illegible] 575	6	7.4	59	10.3	90	7.8	66	9.0	90	8.5	71	11.8	92	7.8	66	10.0	92
45	Nations Ford	871	6	6.4	45	8.0	68	7.3	59	8.2	80	6.9	53	10.0	81	6.8	52	8.2	78
45	Newell	761	6	6.6	46	8.0	68	6.7	49	8.0	73	7.1	54	9.6	80	6.7	50	8.0	75
50	Oakhurst	468	6	5.6	34	7.5	60	5.7	31	7.8	66	5.9	40	8.3	67	5.7	33	7.8	64
48	Oaklawn	409	6	6.4	45	[illegible]	67	7.7	67	8.6	84	6.8	62	10.1	82	7.0	55	8.4	80
37	Piedmont	6th grade only → 113	6	4.9	25	10.0	88	5.4	26	8.5	83	4.5	26	11.6	91	5.2	25	9.2	88
49	Plaza Road	349	6	5.5	33	7.4	59	5.6	30	6.7	60	4.6	27	[illegible]	51	5.4	29	6.8	52
46	Sedgefield	568	6	5.5	34	8.0	66	6.6	48	8.0	73	5.7	39	8.7	73	6.1	40	8.0	71
41	Selwyn	637	6	4.5	19	9.6	84	5.3	30	8.2	80	4.6	27	10.9	89	5.2	25	8.9	86
45	Sharon	632	6	6.5	47	9.9	85	6.7	51	8.8	86	6.8	51	11.8	92	6.7	49	9.7	90
43	Statesville Road	777	6	6.3	45	6.5	47	6.9	53	7.0	54	6.9	53	7.0	54	6.7	49	6.7	50
36	Steele Creek	747	6	6.1	41	9.5	84	7.0	56	9.7	85	7.2	5	11.0	89	6.7	50	8.0	88
34	Sterling	766	6	5.5	34	8.0	69	6.5	46	8.0	72	6.4	45	9.3	77	6.1	39	8.0	73
43	Thomasboro	609	6	6.0	40	6.2	43	7.8	69	8.0	72	7.1	55	7.8	61	6.9	54	7.2	58
41	Tryon Hills	378	6	5.5	33	8.4	73	6.3	40	8.5	84	5.6	39	10.1	82	5.8	35	8.7	84
38	Tuckaseegee	328	6	5.0	26	7.2	54	5.9	34	7.2	56	4.9	31	7.7	60	5.4	29	7.1	57
35	University Park	591	6	6.1	41	8.0	67	6.8	52	8.0	78	6.8	51	9.8	79	6.5	47	8.0	78
42	Westerly Hills	516	6	5.7	37	7.5	60	5.9	34	7.5	64	5.6	39	8.2	67	5.8	36	7.4	62
37	Windsor Park	535	6	4.5	19	8.0	68	5.6	30	7.9	70	4.2	21	9.6	75	4.9	22	8.0	71

I would like to go over these with you, because you were told something this morning that is not true. You were told that in reading the black sixth-graders, whom Judge McMillan had cited in his 1969 court order for having such a variance in scores from the whites, are now achieving on virtually a 6th grade level.

In order to be achieving on a grade level, the sixth-graders have to achieve at 6 years and 7 months (6.7). We have the first school—Allenbrook—and I will not read the names after this. The black students are achieving at 7.1, so they are above grade level; and the whites are at 8.9.

Then we see blacks at 5.6; and the whites are at 7.5. We go to the blacks at 5.7 and the whites at 9.1. We go to the blacks at 5.2 and the whites at 7.2, and on down the line. We have very, very few black sixth-grade classes that are achieving at grade level on the California Achievement Test which was instituted just 3 years ago, at which time our testing grades in our system rose dramatically.

The final conclusions on the test results as published by the school system—are: On the overall testing our white ninth-grade students are achieving at 12.1 grade level, while our black 9th graders are achieving at an 8.2 grade level. All of those children have been in desegregated schools all of their school life, and the gap between black and white scores is as wide as or wider than it was when we started this busing.

The only conclusion that I can draw from this is that there are lots of people in our community, as well as other communities who prefer to continue a mistake while closing their eyes to the fact that the black child is not being reached adequately rather than go through indepth analysis to find out what really works.

There are people like Dr. Ralph Scott, with his Home Start project, who have proven that if you go to black parents, even those without an education, you can get strong support, thus strong motivation for their children's learning.

There are people like Marva Collins in Chicago, who is teaching black students, many of whom the Chicago system gave up on as hopeless, and who are now achieving way above grade level, and loving the challenge.

Why do we refuse to look at the things that work while we stick with a policy such as forced racial assignment which does not work?

I do not know if your bill is the answer. I have some questions after hearing Senator Heflin this morning. If it leaves the people like myself and my children, all of whom were in the public system at some time in their schooling, locked into a situation where parents have no control, and if it leaves the children of the lady that I told you about who was terribly upset when her children were removed from the school to which she had voluntarily sent them and then forced to go with the rest of the kids in the neighborhood who were not being supervised by their parents and whose education was not stressed at home—if it leaves all of us and all the countless others in the Nation, who have already gone through this trauma and struggled to survive, locked in, then I cannot be for it.

But Senator, I ask you—I guess I could honestly say I beg you do something to get the support of your colleagues to take back the jurisdiction that the Constitution provided for you. The courts have no business in education. The courts have no business in rearranging social structure.

If what they have done with the school assignments is really justified under the 14th amendment, then it is just as justified to make us live in certain neighborhoods, work in certain businesses, and eventually achieve mediocrity equally. I do not believe our constitutional framers had that in mind.

Please, let our black children and our white children know they are not ignored.

Thank you.

Senator EAST. Thank you, Ms. Scott.

I would like to comment on a point, Ms. Scott, that you made and then turn to some thoughts that I have based on the earlier testimony.

I regret that when Senator Heflin was here we were not able to have a little more colloquy on this question that he raised and you have raised too—it is a very fine point—as to whether this bill leaves locked in current court-ordered busing.

The answer we would give to that is that it does not lock in current court-ordered busing. It says on page 4, section 3, in the middle of the page, "Notwithstanding any other provision of law, no inferior court of the United States nor any judge of any inferior court of the United States shall have jurisdiction to issue any injunction, writ, process, order, citation, or order with respect to contempt, rule, judgment, decree, or command," and so forth.

I think the fair and reasonable interpretation of that language is that if the bill were passed a school board would then be free to choose what it wanted to do and to alter what it wanted to do, and it could not be held in contempt.

Ms. SCOTT. That is different.

Senator EAST. That is very different.

If Senator Heflin or others would be more comfortable with a specific retroactive provision, I am not personally opposed to that at all. The merit of this, as opposed to what he may be proposing—in his case you would specifically have to initiate it in order to get alteration, but in our case we could contend on the retroactivity argument it is superior, if that is what one is concerned about. You would not even have to ask for a reopening or readjustment; the board could simply decide what new course of action it wanted to take, knowing that the lower Federal courts could not issue contempt citations for existing arrangements.

For example, in the Charlotte-Mecklenburg area Judge McMillan has had jurisdiction of your school system for 10 years; he still has it, and will have it, he contends, until "a unitary system is achieved," whatever that means.

But this bill would clearly prevent him—just using that as an illustration—from issuing contempt citations against the Charlotte board. So we would contend that is in it.

I would certainly quickly and readily concede the point that if many feel it is not in there, and they would like a specific mechanism for reopening and find that a superior statutory provision, I by no means oppose it.

That is something we would want to make sure of for those who support the general thrust of the legislation. We appreciate that those who are opposed to it do not want any of it.

But you and I would not be at odds on that point. I wanted to clarify that point.

Ms. SCOTT. I would make one further request of you and the subcommittee. Please go over this written testimony with all of the figures which were gotten from official records and check them with the statements that were made in Judge McMillan's testimony.

I found in his court orders while I was on the board and before I went on the board, as I am finding now: There are statements made that are most misleading, and I hope you will check them carefully.

Senator EAST. We certainly will. Thank you.

I would just like to make a few comments generally on the very high quality of the testimony that you have all made. Again, we all appreciate how time crowds away on us, I guess beyond a point where even the mind can no longer absorb any more no matter how intriguing and fascinating the subject.

I have often remarked to groups that as a freshman Senator I was very honored to be made chairman of the Separation of Powers Subcommittee; and then our distinguished chairman, Senator Thurmond, proceeded to assign me bills dealing with abortion, busing, and prayer in the classroom. If that is what my friends are doing for me, some day I will be happy to explain what my enemies have in store for me. [Laughter.]

I have found that I have several of the more emotional issues with which to grapple. But anyway, it is part of the legislative process; so I do not wish that this be interpreted as complaining. We are happy to proceed and do the best we can with it.

The other three of you have a common denominator in your arguments and I am not quarreling with them, because you are here to testify to that experience. As all of you have, I think, conceded, you could find counterparts in your communities who might be less euphoric about what has been achieved with the program.

It seems to me by the very nature of your testimony you underscore the value of the bill—if I might so twist your comments in this rationale. You see, this bill would not interfere with what people wanted to do locally. In fact, it would shore it up. It would get the lower Federal courts out of the business, but it would allow local school boards to do what they wanted and State courts to do what they wanted.

I find it very consistent with the Madisonian model of local government, State government, pluralism, and diversity; it could be the Louisville plan, the Seattle plan, the Little Rock plan.

The problem is this: With the evolution of this in terms of lower Federal court involvement, is it not an evolving standard of attempting to impose some sort of unitary national plan?

At some point it is a subtle matter of democratic political theory. You cannot quantify it; you cannot measure it. It is difficult to articulate, to be candid about it. It is somewhat an appreciation of a sense of human nature, a sense of community, and the limitations of coercion in a free society.

I think Edmund Burke can help us more in this context than, let us say, Jeremy Bentham—Jeremy Bentham, best known for counting heads and quantifying facts, and Burke talking about the importance of community and looking at us as human beings living in communities. Those of us in the legislative body have to grapple with problems in that context.

It strikes me that the three of you are conceding that your posture has probably not enjoyed broad-based popular support in your communities. Perhaps it does. I am not saying. It may be that people in Louisville, or Seattle, or Little Rock are very enthused about forced busing for purposes of achieving racial balance—that it is a part of the sense of value and community there; it is accepted; it is looked upon as a positive force.

This bill would not interfere with that. It would allow the city of Little Rock, the city of St. Louis, and the city of Seattle to continue to do that and with the blessing of this subcommittee, the Judiciary Committee, and the U.S. Senate.

It is one of those issues on which I appreciate reasonable-minded and fair-minded people can disagree over. I have finally come to the conclusion that you get a visceral sense of what people are like and what communities are like and what is possible in a free society.

As I try to develop my own judgment on that, this forced busing for purposes of achieving racial balance just will not stand the test. It is a noble idea even; I am willing to concede nobility of intent; but it just does such great violence to what I understand to be a sound civil rights policy, which need not include such a draconian remedy.

I think one can be very much committed to equality under the Constitution without embracing every possible, conceivable remedy that a supporter might come up with.

As a disabled person for example, I could come up with remedies for removing architectural barriers that would be draconian. It would be impossible for society to achieve them. I could require that every private home in America be made accessible to wheelchairs and that every restroom, and so on and so forth.

I am simply suggesting that society in America, I think, is committed to helping the physically handicapped; but certainly it is not quite fair to society to say,

> You must embrace every conceivable remedy no matter how costly, outlandish, and contrary to community sentiment; no matter how utterly at odds with the commonsense of logistics, you must embrace it; and if you do not, I will charge you with being prejudiced against handicapped people.

You would be very resistant to that notion, and I am resistant to the notion that one has to walk this very, very troublesome plank of forced busing for purposes of achieving racial balance. I can see the nobility of those who are for it.

As I understand the nature of man and sense of community, I simply cannot say,"Yes, this is a good idea; and we ought to impose it as a national standard." I am willing to concede State and local control and be done with it. They do not have to adopt John East's standard nationwide, but I hope, and beg, and pray they will spare us their imposition of one uniform national standard and let the Madisonian model of pluralism and diversity work its way in this difficult area, as frankly I wish they had done in the abortion area.

There is not always merit of nationalizing and centralizing every major public issue in American life. We have done that in recent years, and do you know who has done it? The courts. That is why we are here discussing this today. That is why we are here discussing abortion.

The Court has insisted upon nationalizing every hot emotional issue and making it the litmus test of some right or other—in the case of abortion, the right of privacy; in this case, the supposed right of equality under the Constitution. The average American, with good commonsense, I do not think buys that and appreciates there is some virtue in letting State and local government from time to time handle certain kinds of problems, particularly when there is such profound division within the community as to the relative merit of a particular approach.

Well, I spill that out to you, not that it really is a question but just to show you where one freshman legislator feels that he is coming from on this and the agony I have with it.

Second, on the matter of whether we have the power to do this under article 3 of the U.S. Constitution, as a holder of a law degree and a Ph. D. in political science, I do not wish to fault those who take another point of view; but to me it is an unarguable proposition that under article 3 we have the power to withdraw the appellate jurisdiction of the courts. We have the power to withdraw the appellate jurisdiction of the U.S. Supreme Court. The framers gave it to us.

One might question the prudence of exercising it, and I understand that. That is a legitimate point. Is it prudent to do it in this case? Is it a prudent precedent to have? I do not quarrel with the prudence argument, but to ask us to concede the power and say that we do not have is to ask us to concede what is explicitly granted, in my judgment, in article 3.

It used to be the conventional wisdom of law school classes on constitutional law, and now apparently all you need to do is find some obscure scholar somewhere who maybe raises a question mark, and all of a sudden you say, "Oh, my gosh; that is probably unconstitutional."

Well, let us try. Sometimes we do not know. The Supreme Court ultimately would decide, I presume. If they ruled against us, it would be their prerogative to do so. What we could do is go back to the constitutional amendment drawing board and find one that nailed it down and met whatever objections they saw currently existing in article 3.

I do not see how one can deny that we have the power to withdraw—we have the power to create the lower Federal courts. We could today—the Congress alone under the Constitution—abolish the lower Federal courts. We could simply say, "They no longer exist." I am not saying that would be prudent to do; nor am I recommending it, lest we have some sleepy members of the press who think I have really slipped off the trolley here.

No, I am simply saying that the framers—those very gentle, moderate folks like Jefferson and Madison—gave us that kind of power. It is heavy artillery, and it ought to be used with great restraint, but they did give it to us.

I become, I will admit, a little testy when I hear gratuitous comments from the executive branch or maybe from the judiciary itself or from interested citizens that, "Oh, for heaven's sakes, you good gentlemen don't have that power; you ought to be ashamed even to think about it." I say, "The devil, we don't. We have got it; it's there." What we need to do is decide whether it would be prudent to use it in this case. That is a fair question.

I think the remedy here of forced busing to achieve racial balance is a noble idea that has failed with equal nobility. The fall has been as great as the vision. The problem is how do we get out from underneath the rubble; how do we cut through the Gordian knot. I do not have any vested interest in how we do it.

The American people eventually will decide what they want done, I presume. I think this is a reasonable answer to it. It is like a good single shot; it goes to the heart of the problem—namely, that the lower Federal courts have been creating the chaos and confusion. Again, it would leave it to State and local governments to do what they want to do. I think you would have a sounder, more mature, and enduring race relations in this country over the long run—higher quality of education, better community relations, and a sounder concept of constitutional law.

It is the remedy in the whole civil rights movement that has been driven to a point of, I feel, abuse and excess. I just end on this note and invite your comments.

I would certainly want these hearings to make clear the following point: Is this the litmus test? Is forced busing for purposes of achieving racial balance and a sound civil rights policy? No, it is not the litmus test. It is counterproductive.

The country could then move on to implementing this, as the Assistant Attorney General said—a mature, intelligent, sound civil rights policy that really gets down to the specific problems of insuring racial fairness and equality under the 14th amendment and under the due process clause of the 5th amendment.

I think it is too bad we are hung up on this. It has stymied us. It has somewhat soured the atmosphere. I noticed Thomas Sowell said so the other day. I think he makes good sense on this, speaking as a black who is opposed to it. I realize there are many blacks who support it.

Blacks seem to be divided on the issue; whites seem to be divided on the issue. It is part of American democracy, I guess.

But right now the legislative process is working its way, and we will see where it comes out. I simply do not know. I do not profess to speak for all of my colleagues; nor would I even attempt to do so; and I have no vested interest in where it comes out.

Just as one single person, I feel that the current status of things is impossible to defend as a matter of policy or as a matter of constitutional provision.

Mr. Rule, do you have a question?

Mr. Rule. Mr. Chairman, I am going to have to excuse myself, by your leave and your indulgence. I have an airplane to catch.

Senator East. I am sorry.

Mr. Rule. I apologize for having to leave early.

Senator East. You are not leaving early. I appreciate your staying this long. No one who leaves right now or hereafter can be accused of leaving early.

Mr. Rule. And I want to apologize to the other panelists for having to leave.

Senator East. I am sorry. I thought you were waiting to make a comment. I would not have held you up.

I would want all of you to feel free at any point—when airplanes beckon or whatever, and you must go—please feel free to go. We will wind up here very shortly.

Thank you very much, Mr. Rule. We appreciate your coming.

Ms. Hittman?

Ms. Hittman. I think you said you certainly are applauding the locally developed plans. I appreciate your positive comments about our Seattle experience.

The reason we are here—and there are "facts" that you present as finding in your bill—at least from our perspective, is to present to you some facts; and to say that the findings in S. 1647 are erroneous. You had to hear of the Seattle experience as well.

I was wondering what your thinking would be, since you have been so laudatory about local control—which is something that we indeed are very interested in as well—would you make it impossible for our district to seek Federal court relief for Seattle? Others--for example, the State initiative—tried to stop the local districts from trying to make their own decisions in this matter.

Senator East. Not necessarily. I would want to examine the nature of the problem and precisely what is involved as regards State versus local control and all of the complications thereof. I am certainly, at least on this point, willing to concede that it is State and local control that I would like to put the focus on.

Now, if you are asking would I always want to forsake State control for local control—not necessarily, although I am not saying there could not be some merit in it.

As you know, in the founding concept of this country the creating units are the States. They created the Federal Government, and they created State and local governments and all subdivisions thereof.

We start in the American system with the premise that the States are the foundation-creating units. Whether I would want to have them preempted in any case or any type of subject matter permanently, in that they would have to yield totally and permanently to local control, I am not quite sure I want to concede that and might be more inclined to leave it ultimately, if I could, to the State and local resolution of the problem.

You raise a fair point. I would want to consider it.

Ms. Hittman. Would this bill prevent that? I guess that is my question.

Senator East. Would this bill prevent——

Ms. Hittman [continuing]. Prevent us from seeking Federal court relief if our State were not to allow us local control in this particular issue.

Senator East. If I understand your point, I do not see that this bill would preclude State courts from issuing orders requiring busing for purposes of achieving racial balances or proportions.

Ms. HITTMAN. If I understood you correctly, your intent in the language of this is that we could still seek Federal court relief.

Senator EAST. You could seek it in the State courts without any difficulty.

Ms. HITTMAN. But if the State has prevented us from being able to take our local action—that is my issue—and we then seek Federal court relief under the provision of this bill.

Senator EAST. Then I say the problem is less a problem presented by this bill but is more a fundamental problem of federalism whether on this particular legal issue, whether State law or local preference ought to prevail. I do not think that is directly germane to the thrust of this bill, except for the problem of this bill dealing again with the capacity of the lower Federal courts to impose a solution. Maybe I misunderstand you still.

Ms. HITTMAN. I just hope we do not have to face that, but it is the potential that we will, depending on how the Supreme Court would rule. If they would rule that indeed the measure is constitutional in the State of Washington, then indeed———

Senator EAST. I do not know what they would do, but they might rule in terms of federalism and under the constitution of the State of Washington that State government is a superior unit here, which would not be an uncommon thing in that the States were the creating units in the American federal system. State and local government exists at the sufferance of State government in American federalism.

We have enabling statutes that allow cities to be created and subdivisions thereof, including school districts. I do not know, but I would suspect that that is going to be a complicating factor.

Ms. HITTMAN. In light of what Mr. Reynolds said earlier and some of the remedies that the administration would be advocating, we have been there, and it does not work. You still end up with segregated schools; it does not work. The magnet programs do not work alone. The voluntary programs do not work alone.

It is in light of that; and I do not mean to belabor the issue, but I wanted to bring to you the history of Seattle, because we have tried the very programs that Mr. Reynolds was speaking about since 1963, and they do not work.

Even for magnet schools you must impose racial classification for the entrants to magnet schools in order to achieve the very thing that I know you and I both want, which is quality, integrated experiences for the schoolchildren of the United States.

Senator EAST. It seems to me that the obsession that proponents of busing have is that they think it is intolerable that you would have a predominantly black school or institution.

When you say, "It didn't work," what you meant is that there were institutions that were predominantly black.

Ms. HITTMAN. What I mean is that the children who did move were the black students. The whites did not.

If you impose educationally sound strategies, such as we have in Seattle—we have schools that are predominantly minority, and a good case is the bilingual orientation center. That would be providing the best, sound educational strategy for those young students, when they are new immigrants to this country, to have the opportunity to be together for a period of time for the culturalization process.

Education is what we are about, not busing.

Senator **East**. But there I dissent with you. I think you are singling out education as one dimension of the human experience. I am back to Burke and the sense of community. I do not see how we fully escape that.

For example, if the goal is totally some sort of integrated or fully racially balanced education, how does one deal with black children who live in Harlem, Washington, D.C., or Watts, or white children in South Dakota? To some extent it cannot be achieved.

You see, I am raising a very fundamental problem of community and distribution of population. At some point does it not become the commonsense of life that distribution of people makes busing logistically impossible?

You can apply it at the college and university level in North Carolina. We have five black colleges and universities. Or you have Howard University in Washington or Fiske in Nashville. Is the implication of all of this that those institutions are bound to be, in some degree, inferior in quality because the experience is predominantly a culturally black one? If so, there is a certain patronizing attitude, it seems to me, with the ardent proponents of busing in proportions. They seem to be uncomfortable with the idea of a sense of community."

I do not know how you escape that. You have predominantly black communities, predominantly Chinese, this, that, and the other thing. Is it not the commonsense way people are, live, move, and have their being?

When you single out just education, you are treating us like artifacts or like Medflies—you are saying "We are not people; we are not living in communities; we are not a community of values; we are things. You order us like you would order blocks of cement; you assign us to go here, and you assign us to go there. Again, it is very elitist; it is very utopian; it has the idea that people are things to be bent, molded, sent, and directed—good in utopian books but contrary to the nature of people in the sense of community."

When you say, "It doesn't work," the problem is that you are never going to be able to fully eliminate institutions that may be predominantly black or white in many areas simply because of the understanding of the sense of community.

One ought not have to have a Ph. D. in sociology to figure that one out. It inheres in the nature of man to live in community and to have institutions that are closely allied with and within those communities—churches, schools, recreation areas, parks, and so on.

We cannot just dismantle communities and move people around like things. They resent it, be they black or white.

Ms. **Hittman**. I think that is true; but I think, as both Ms. Hutto and I pointed out, the role that this plays in achieving integrated housing, which I think is something which you and other persons have who have been here today certainly have spoken of earlier, integrated housing is what we want, rather than having these enclaves within our communities that are isolated. Part of that isolation may be cultural, but another part of it has come about through our financial institutions, through housing policies, and through a number of policies in the community.

I think that part of our charge is to prepare children for this democratic society; that is what we are interested in. But I will not belabor that point any more; I just want to reaffirm what I asked you earlier. If I understood correctly, this bill that you have proposed—S. 1647—would not or does not remove Federal court jurisdiction in the Seattle situation that I described.

Ms. SCOTT. Mr. Chairman, I have to leave to catch a plane, but I would like to make one remark, if I may, before I go.

Senator EAST. Yes.

Ms. SCOTT. I think what I am hearing these two ladies saying is that there is something magic in racial mixing that automatically provides for a better education for the black child at least and insurance that the black child and the white child will be able to better function in the society that we live in.

I dispute that, and I dispute it on the grounds that if you give children an education that really works, that provides for self-accomplishment, and that enables them to reach their potential, they are far better able to cope with people of other races, of other intellects, and of other persuasions than they are when they come to those relationships with poor self-esteem.

To tell a black child that his education is inferior simply because he is with all-black children, to me, is racist; and this is what the black kids said to us when the rioting broke out in our school system. They resented it then, and they resent it now, and I really do not blame them.

Thank you.

Senator EAST. Thank you.

I wish to thank you all again for coming. Since the hour is late, we have probably done all the damage at least that we can do today one way or the other.

[The prepared statements and submissions of Mmes. Hittman and Scott and of Messrs. Atkins and Rule follow:]

PREPARED STATEMENT OF THOMAS I. ATKINS

Mr. Chairman, and members of the Committee, I wish to thank you for giving me this opportunity to share with you my observations and thoughts about S. 1647, and its provisions on the jurisdiction of the federal courts to entertain effective remedies to racial discrimination and segregation in public schools.

I should preface my remarks by sufficient information about myself and my organization to permit the following comments to be placed in context. I am General Counsel of the NAACP, in which capacity I am responsible for approving and supervising the conduct of any litigation in which any of our 2300 subordinate units may be involved. While this responsibility includes far more than just school discrimination law suits, it would be fair to say that the NAACP has had, and continues to have, a substantial interest in the subject of school segregation, school discrimination and the pursuit of effective remedies for these problems. The NAACP has been the primary non-public entity responsible for developing the legal framework within which state and federal courts have considered complaints of racial discrimination--whether in education, employment, housing, public services and accomodations, voting rights, use of public funds and facilities, law enforcement and criminal justice. Just as we have Branches in every state of the Union, so have we had occasion to review public policies and practices in the area of racial discrimination and segregation in every state of the Union. This opportunity to review and consider first-hand the actions of local, state and federal officials in every part of the country has given us a perspective on these issues which may be of some value to this Committee, because we have been forced to confront facts and realities of the type on the basis of which sound public policy should be based, particularly legislative findings and acts.

Prior to becoming General Counsel, and since, I have had substantial experience in school discrimination litigation. I have litigated such cases in the following states and cities: MICHIGAN (Detroit, Kalamazoo, Benton Harbor); OHIO (Cleveland, Youngstown, Columbus, Cincinatti, Lorain); INDIANA (Indianapolis, Hammond, South Bend); WISCONSIN (Milwaukee); ILLINOIS (Chicago); CALIFORNIA (San Francisco, Los Angeles); NEW YORK(New York City, Buffalo, Yonkers); TEXAS(Dallas). MISSOURI(St. Louis). Additionally, I have had supervisory responsibility for similar cases in CONNECTICUT(Hartford); MASSACHUSETTS(Boston); OHIO(Dayton); CALIFORNIA(Sacramento, San Diego, San Bernardino); NEW YORK(Mt. Vernon); WASHINGTON(Seattle); MARYLAND(Prince George's County). My experience has included every phase of school discrimination litigation--drafting of initial complaints; pre-trial discovery; trial; preparing post-trial briefs and findings; preparing and arguing in Courts of Appeals and the United States Supreme Court; preparing guidelines for remedial plans; monitoring remedial implementation. I have also had occasion to meet and discuss such cases with local, state and federal educational officials, as well as with the U.S. Justice Department. While most of my work in this area has been as Counsel for Plaintiffs, I have also represented a local school board(Indianapolis), and served as spokesman for local plaintiffs(Boston).

My comments today will be in opposition to the provisions of S. 1647, both on grounds of fact and law. My initial comments will focus on the provisions of Section 2(b), wherein are to be found certain proposed Legislative Findings.

Comments on Proposed Legislative Findings

While my specific remarks will deal with the proposed Findings in the context of four specific school desegregation contexts--Boston, Detroit, Columbus and Cleveland--my remarks will have equal application to the other cases in which I have been personally involved, with few exceptions, and I will be glad to share with the Committee such observations as might be helpful about any of these cases.

1. #1, insofar as it "declares" that desegregative assignments and transportation "leads to greater separation of the races by causing affected families to relocate their places of residence or disenroll their children from public schools",is an assertion in search of factual support. In Boston, Cleveland, Columbus and Detroit, the level of racial separation before desegregation orders were entered by the Courts was almost impossible to improve upon. Both in residential and school terms, the races were segregated: in schools by the proven action of the public officials; in housing by a combination

of public action and private actions. Such relocation or disenrollment as took place in each of these cities had begun well before desegregation began, was marginally increased afterwards, and was only slightly related to the fact of desegregation. More important in each city was the poor quality of the public schools before and unrelated to desegregation. The city with the highest quality before desegregation was Columbus, and it also registered the least amount of relocation and/or disenrollment.

2. The other "economic and sociological factors other than past discrimination by public officials" which #2 posits as the more probable reason for imbalance were, in each case,thoroughly examined by the courts. In none of these four cases were the school officials able to explain how these "other factors" changed a single boundary line, assigned a single child outside his neighborhood, created optional attendance zones, manipulated elementary and junior high feeder patterns, excluded black and other minority teachers from particular schools and assigned them exclusively to other schools, or discriminated in the allocation of such educational resources as books, supplies, and administrative staff. All of these actions were taken by the public school officials in each city, and in each case the courts held them responsible for what they had done, not what others with like motives had or might have done. The federal courts have not entered desegregation orders to correct "racial imbalance", only to rectify racial segregation caused by public action which has been proven in court.

3. #3 suggests that desegregative asssignments are "not reasonably related to the achievement of the compelling governmental interest in eliminating de jure, purposeful segregation because such segregation can be eliminated without such assignment and transportation". The author of this "Finding" has obviously not read the record of the school desegregation cases in federal courts. Had the author taken this time, he/she would know that federal courts attempt to use the least disruptive remedy which will achieve the actual desegregation required by the Supreme Court rulings. In this context, they permit the use of boundary changes, grade and feeder changes, use of student transfers, use of magnet schools and programs--all

before requiring that students be reassigned and transported. Where the school officials can demonstrate that the segregation they causeed can be remedied by means other than reassignment and transportation the federal courts prefer these remedies. Where the racial segregation cannot be remedied by other means, assignment is then utilized. In each of the four cases here mentioned, all of the techniques above are being used, in conjunction with assignment and transportation to accomplish the result which none of them alone could achieve.

4. Finding #4 asserts that desegregative assignments "cause significant educational, familial, and social dislocations without commensurate benefits". Every time school officials close a school, open a school, remove or append and addition to an existing school, change a boundary, change grade or feeder patterns, begin or terminate transportation--without or with desegregation--disruption occurs. The policy question is whether this disruption, where required to correct constitutional violations, is "commensurate" with the benefits received. I would suggest that this Committee will probably have as difficult a time as I in trying to measure the value of the benefit conferred by the First Amendment, or the value of the loss imposed when the Fourteenth Amendment's equal protections are denied. As measured by whom: the one whose has lost the protection? the one whose public conduct, having been adjudicated, must take part in remeidal action? the children whose achievement scores are shown to have improved after desegregative assignments? How does one distinguish between that disruption which occurs from a reassignment caused by grade structure changes where desegregation is not a factor, and that where desegregation was the cause? Which school closing is disruptive--the one which occurs where desegregation is a factor, or that which occurs where desegregation is not a factor? To the extent the author suggests that one is, and one is not disruptive, the suggestion is not supportable in fact. To the extent the author ignores the fact that both are disruptive, then on what basis are the desegregation-related "disruptions" singled out for prohibition and the other passed by? In each of the four cities mentioned, schools were closed, boundaries were changed, grades were altered, student assignments were changed both before and during desegregation. It is unddoubtedly the case that some of each were disruptive. It

is absurd to suggest that only when these type changes occur in the context of desegregation are they disruptive. In any event, the disruption which occurs, if measurable, is not as serious as permitting constitutional violations to go unremedied, if possible.

5. #5 and #6 are related, the one asserting that "community support for public education" is undermined, the other asserting that desegregative assignments are "disruptive of social peace and racial harmony". I hope it does not come as a great surprise to this Committee to know that the documented erosion of public support for public schools is a national phenomenon, occuring in school districts which have had no desegregation, school districts with desegregation, and school districts which don't even have any blacks or other minorities. It is insupportable to assert that this phenomenon, which started well before the first desegregation plan was ever ordered by a federal court, is "caused" by desegregative assignments and/or transportation. In Boston, the school system, like the city, had been experiencing a loss of population for some 10 years before the advent of school desegregation discussions, and some 20 years before it even appeared likely that some desegregation might result, and 25 years before the specifics of any desegregative assignments were evident. In Detroit, Columbus and Cleveland, similar population shifts had begun well before the federal courts were factors in school issues around desegregation, and before the complaints were first filed, and similar erosion of public support for public education were also recorded. Public support began to erode when the public realized that the school officials could not or would not teach their children to read, count, comprehend and become eligible for higher education and/or employment. Similar erosion of public support has been noted in school districts from one end of the country to the other, including in the vast majority of school districts which have not been involved in any federal court proceedings around desegregation. It is indisputable that desegregation has coincided with this erosion; it is another matter altogether to say that the erosion is correlated with desegregative assignments.

The "social peace and racial harmony" it is asserted have been "disrupted" by desegregative assignments has certainly not existed in any major American city which has been the subject of school discrimination litigation. Black Americans have never been "peaceful" about the deprivation of such constitutional rights as are secured by the Fourteenth Amendment--whether the right to attend a school unsegregated by public action, or the right to eat at a lunch counter unsegregated by public action, or the right to vote in an election unimpeded by public action. Any careful and honest reading of American history could not conclude otherwise. This country began to deprive itself of "racial harmony" when various people in it insisted on the right to proscribe the ability of other Americans to enjoy the same measure of constitutional protections they themselves enjoyed. Declaring "social peace and racial harmony" to have been present before, and disrupted by, desegregative assignments is no more honest than to have "declared victory in Vietname" and left. The facts, like the oft-quoted melody, lingers on after such false and inaccurate declarations are made. In Detroit, in 1943, the country's first major urban riot took place around issues of racial discrimination. In Boston, as early as the 19th century, black people were vigorously protesting the policies of forced school segregation. In Columbus, blacks protested racial discrimination in housing, employment, and education in the 1920's--some 58 years before the first desegregative assignment took place. In Cleveland,in the early 1900's, blacks were protesting racial segregation in housing, racial discrimination in education, and racial discrimination in police practices. In 1966, a white Minister was killed in Cleveland at the site of a public school construction which was resisted because of deliberate racial segregation, and huge racial uprisings occured in the Hough area in 1964. To ascribe to desegregative assignments the responsibility for the absence of "social peace and racial harmony" is to engage in myopic reasoning and to ignore the inescapable lessons of our country's history. Some would prefer to forget it, but this country went to war in the 1860's because some preferred the "social peace and racial harmony" presumably attendant to slavery.

6. #8, and its assertions about the debilitation and disruption of public educational systems, is akin to the "findings" just discussed. Once a school system has been found unconstitutionally

operated and structured , the constitution demands that its ability to continue in such an illegal fashion be both debilitated and disrupted. Just as it is obviously inconvenient for a bank robber to be hauled to jail when caught, so it is "disruptive and debilitative" to those who deliberately created racially separate schools to be faced with desegregative assignments flowing from a federal court order. We could accomodate the bank robber by not "inconveniencing" him, and we could permit the illegal systems to continue without "disruption". It has not been demonstrated in any court of law of which I am aware, nor in any research study of which I am aware, that school systems undergoing desegregation are "debilitated", nor that their ability to offer constitutionally sound education is "disrupted." The issue here isto what standard should public officials and public school systems be held. The Supreme Court, and the lower federal courts, have each held that public officials and public school systems, must each obey and operate within the framework of the constitution. This is not "disruption", nor is it "debilitation"; it is rather the price we pay for a constitutional democracy in which laws are presumed to have greater sway than the personal prejudices of men in public office. In Cleveland, Columbus, Boston, and Detroit, the school systems have been changed in fundamental ways by the federal court orders. In none has the public school system been debilitated. In fact, in each case, the level of public involvement has increased, the amount of money available for educational programming has increased, the scope and number of academic programs have increased.

7. Findings #9 and 10 address the same issue: once a constitutional violation has been discovered, how should remediation be approached, and who gets exempted from the reach of remedial orders? The federal courts have operated on the premise that it is inequitable to unnecessarily burden blacks more than whites, or vice-versa, in remedying publicly-caused school segregation and discrimination. They have been required to make every effort to "balance the equities", and to distribute such burden as may be attendant to desegregation. This means, for instance, that in each of Cleveland, Detroit, Columbus and Boston, both black and white students are desegregatively

assigned, each according to the same set of criteria, each within the same set of time and distance parameters. In none of these four cities has it been claimed that the school children "caused" the racial segregation, though they participate in the remedy. The reason is simple: school systems have been found unconstitutionally operated in each instance, and the school systems have been required to desegregate. It is impossible to desegregate school systems without involving school children. The Supreme Court has consistently found that it is the school child whose constitutional rights to equal protection have been abridged by forced public school segregation. American history , and law, is premised on the notion that the equal ability to enjoy constitutional rights is a benefit, not a burden. There is no logical reason why the constitutional right to be free of officially-caused racial segregation should be viewed any differently. The Constitution does not guarantee the "right" to be forcibly separated on the basis of race; it guarantees that no public official may engage in such conduct. When, as in each of these and other federal cases, public officials and the systems they operate, have been found to violate the constitutional standards, the schools must be as nearly as possible returned to a constitutionally neutral position. In some instances this will mean the use of magnet schools to expand improperly denied opportunities; in other instances, it will mean desegregative assignments to undo previous segregative assignments which produced racially dual systems. In each of Cleveland, Columbus, Detroit and Boston, the pattern of student assignments before federal court intervention was decidedly discriminatory on the basis of race. To the extent this Finding suggests that the absence of federal court remedial assignments would have left "racially neutral treatment", it is simply uninformed on the nature and structure of school desegregation remedies and the violation trials which precede them. In each of the four cases, the federal courts were required to sit through weeks of testimony, pour over thousands of documentary exhibits, reconcile conflicting and competing explanations for described phenomena. Only after it had been decided that the public officials had deliberately caused the racial segregation in the public schools were remedial assignments made. The remedial assignments in each case encompassed all grades except kindergarten, and involved all parts of each city except Detroit. In Detroit, because the previous racial discrimination had gone on so long and was so advanced, it was impossible to fashion reasonably feasible plans which involved all parts of the school district. In each case, the remedial decrees were premised on Supreme Court rulings which held that it is not racial neutrality to permit previous official racial segregation to remain untouched.

In each of the four cases, the federal court orders included more than simply reassignment of students. In Boston, the court ordered that parents be permitted to be involved in school governance on a scale not previously allowed, and that they be allowed to visit the schools from which they were routinely locked out in the past. The court also ordered that educational offerings be buttressed by the pairing of high schools with colleges, universities and businesses, and that a broad array of magnet schools be created and made available on a city-wide basis. In Boston and Detroit, the federal courts ordered that vocational education programs which had been previously run on racially discriminatory bases be broadened and desegregated, and that school officials take specific steps to remove racial discrimation from student discipline procedures and policies. In each of the four cases, school officials were ordered to remove any remaining vestiges of racially segregative faculty or staff assignment and hiring policies and procedures, and to make desegregative assignments in accordance with federal law and constitutional criteria. In all four cases, in-service training of teachers and other staff was an integral part of the court order. In Boston and Cleveland, public officials who actively resisted and attempted to impede the implementation of the court orders were held in contempt and ordered to comply. In neither Columbus nor Detroit was such resistance present, and the federal courts had no need to impose such sanctions. In Cleveland, Columbus and Detroit, the federal courts found that state officials participated in the creation of the racially segregated schools and programs, and ordered that the state assist in the remedial process. In Boston, Detroit and Cleveland, the federal court ordered the creation of citizen monitoring commissions to advise the court and public on the progress of desegregation, with full access to school officials, records and school facilities. In Boston, since the court found that the state officials had not contributed to the racial segregation on the same scale as the local officials and had made reasonable efforts to correct the problem, no findings of de jure conduct was made against them, though they were invited to become integral parts of the remedial process and have participated fully. In Boston, Cleveland and Detroit, the Community Relations Service of the U.S. Justice Department was invited by the federal court to offer its assistance to the court and school districts and communities during the desegregation process.

In short, Mr. Chairman, the federal courts in each of the four cities herein discussed made every effort to tailor the remedial orders to both the facts found on liability and the needs of the school districts. No two desegregation remedies are alike in the country, as demonstrated by these four plans, and as my own review of the plans across the country affirms. The federal judges in these four cases were not people who sought out the cases on which they sat; they received them in the normal course of their court's rotation. The "Findings" proposed as a part of Section 2 simply don't hold up when measured against the facts which emerged in the courtrooms of these four cities. I would suggest that they would not stand up when measured against the facts on the basis of which any federal court desegregation order has been issued. These "Findings" are inaccurate and uninformed, and they would do great violence to the rule of law by imposing Congressional declarations which are totally contradicted by demonstrable and adjudicated facts. They are so wide of the mark that they cannot be corrected; they should simply not be attempted.

THE LIMITATION OF FEDERAL COURT JURISDICTION

Section 3 addresses certain proposed limitations on the ability of federal courts to order desegregation remedies. I will briefly address the provisions of this Section.

1 . Section 3(a)(1) would prohibit the courts from making desegregative student assignments "for the purpose of altering the racial or ethnic composition"of any school. This section is apparently premised on the "Findings" contained in Section 2, and discussed above. To the extent it attempts to place limits on the ability of

the federal courts to correct constitutional violations, it will not pass constitutional muster. Since in some instances the only way the racial segregation caused by the actions of public officials can be corrected is through the use of student assignment and the provision of transporation, this provision would amount to an unconstitutional constraint on the ability of the courts to vindicate constitutional rights.

2. Section 3(a)(2) would prohibit the closing of any school and the transfering of students therefrom "for the purpose of altering the racial or ethnic composition" of the student body at any other school. The opeing and closing of schools is a normal function of education officials across the country. Where the courts have found either that school closings have been a device for forcible segregation, or that the closing of schools is a necessary means of correcting unconstitutional racial segregation, the language of this section would have to be disregarded or stricken as unconstitutional as applied.

PREPARED STATEMENT OF SUZANNE HITTMAN

Mr. Chairman and members of the Committee. I am proud to be able to present to you today Seattle's experience with school desegregation.

Currently before the Committee are several proposals to limit student assignment and transportation for desegregation. One, S. 1647, seeks to limit only court-ordered desegregation. Another, S. 1147, would by its terms prevent not only federal court-ordered busing, but also desegregation plans which are adopted by local school districts, and even plans which rely solely on voluntary reassignments. Based on Seattle's successful experience with desegregation, we believe that the Congress should take no action which would interfere with the ability of local school districts to desegregate their schools through local initiative and with local control, or which would impair their incentives to do so.

The Seattle School District instituted a systemwide desegregation plan in the fall of 1978. Adoption of the Seattle Plan followed 15 years of unsuccessful attempts to desegregate Seattle's school system using all possible voluntary methods--from voluntary transfers with free transportation to an extensive magnet schools program. Between 1963, when voluntary desegregation efforts began, and 1977, the last year before the Seattle Plan, racial imbalance grew steadily worse. The number of segregated schools and the degree of segregation within schools increased. Moreover, minority students bore a greatly disproportionate share of the burden of movement, since few whites volunteered.

The Seattle School Board and community leadership in

Seattle have had a long term commitment to school desegregation. When it became apparent that the best voluntary efforts possible were not capable of desegregating Seattle's schools, a local concensus formed to desegregate without court intervention. Local business leaders, religious leaders, political leaders and civil rights organizations jointly urged the Seattle School Board to implement without court direction a locally developed and controlled desegregation plan. The School Board responded by: (1) adopting a definition of racial imbalance (minority enrollment at any school more than 20% above the district-wide minority percentage); (2) requiring that desegregation occur through educationally sound strategies; and (3) initiating a six month process of citizen planning activities, which culminated in December 1977 with adoption of the Seattle Plan for elimination of racial imbalance. Local media have been strongly supportive of Seattle's efforts to maintain local control of this issue.

The Seattle Plan relies on roughly equal numbers of mandatory and voluntary student reassignments to accomplish desegregation of the schools. Where voluntary strategies appear incapable of achieving desegregation, elementary schools are desegregated by joining together the populations of two or three neighborhoods in "pairs" or triads." For example, students from both neighborhoods in a pair attend school together, first in grades 1-3 at one site then in grades 4-6 at the other site. Thus, students are assigned on the basis of their neighborhood, and not individually on the basis of race. Students brought together in the elementary grades remain together at the secondary level. Neighborhood students stay together throughout their school careers if they so choose, and students have predictability and stability in their assignments -- both factors which Seattle citizens indicated were important in any desegregation plan. Equity of movement is a key feature of the Plan -- roughly equal numbers of minority and majority students participate. Parents and students have the opportunity to select voluntary alternatives to their initial fixed assignments, which has no doubt enhanced community acceptance of the plan. Educational options include both program content and teaching style alternatives.

Mandatory desegregation is more cost-effective than voluntary. Voluntary desegregation transportation costs over two times as much per student as mandatory, because scattered student movement is less efficient than transporting entire neighborhoods together. Enhanced program content and staffing at magnet schools are additional expenses of voluntary programs, although with tight funding Seattle is operating its option programs at baseline levels as much as possible. In spite of the drastic decline in federal desegregation aid and the tremendous uncertainties of school finance generally in Washington State, Seattle will attempt to preserve the important voluntary features of its plan.

The Seattle Plan has successfully desegregated Seattle's schools, and educational quality has been enhanced. All students now have the opportunity for a multi-ethnic education, which Seattle citizens believe is essential to preparation for life in this pluralistic society. There have been no adverse educational effects. Achievement scores have risen slightly district-wide, and in fact, achievement gains in the pairs and triads appear greater than in other District schools.

The Seattle Plan has not had a harmful effect on white enrollment. Before the Plan, enrollment had fallen steadily from nearly 100,000 (over 85% white) in 1963 to under 60,000 (65% white) in 1977. In the first three years of the Seattle

Plan, the proportion of white students in the District declined roughly 3% per year, the same rate as in the three years before the Plan. Had it not been for the influx of thousands of Asian immigrant students, the drop in the proportion of white students this year and last would have been closer to 1%. And it appears that school desegregation has played a part in slowing, and even reversing, the trend toward greater residential segregation in some portions of the city.

Seattle has adjusted peacefully to desegregated schools. At the last local property tax levy election, a near record rate of voter approval -- roughly 80% -- was achieved. And in the most recent School Board elections, pro-Seattle Plan candidates defeated anti-Seattle Plan candidates. Several efforts to stop the Plan, including a statewide initiative and recent legislative action, have been resisted successfully by the School Board in the courts.

Last spring, after a lengthy process of citizen involvement, the Seattle School Board adopted a three-year plan of school closures and complementary changes in the desegregation plan. Continued local control of desegregation has permitted modifications in the Plan to be made on an educationally sound basis, and with minimum disruption.

Seattle is now prepared to make further progress. The City Council and School Board have jointly adopted goals calling for coordinated action to encourage residential integration. With cooperation of City, School District and housing officials, Seattle should be able to reduce the need for mandatory assignments over the long term.

We believe the Seattle experience demonstrates how proper planning and responsible leadership can produce school desegregation that is successful educationally and successful in stabilizing a city school system. Where elected officials do not ignore their oaths of office, but instead discharge their constitutional obligations, the courts and the federal government need not intrude in local school governance. Again, we urge the Committee to refrain from any action which would impair the ability of local school districts to desegregate with local control, or which would impair their incentive to do so.

Appendix

FINDINGS OF S. 1647, SECTION 2(b), AND S. 1147, SECTION 2(b), IN CONTRAST TO SEATTLE'S EXPERIENCE WITH SCHOOL DESEGREGATION

S. 1647, § 2(b), and S. 1147, § 2(b) purport to make several Congressional "findings" concerning the effects of desegregation assignments and transportation. None of these findings is borne out by Seattle's experience. Below is a listing of S. 1647's supposed findings, each compared with Seattle's contrasting actual findings. S. 1147's largely identical findings are also indicated.

(1) S. 1647: Desegregation assignment and transportation "leads to greater separation of the races and ethnic groups by causing affected families to relocate their places of residence or disenroll their children from public schools."

Seattle: School desegregation in Seattle has led to much higher levels of interracial contact. In the schools, interracial exposure is significantly higher, and racial imbalance significantly lower, than before the Seattle Plan. White enrollment decline has continued under the Plan but at a decelerated rate when compared with the pre-desegregation trend. While some persons have left the schools, at least in the short term, due to the advent of busing, their loss may be more than balanced by those who have remained in the schools because their neighborhood schools are no longer segregated. Analysis of residential and school attendance data shows that white enrollment loss has slowed since desegregation in areas which formerly were experiencing rapid transition from majority to minority status. Thus, desegregation in Seattle has reduced racial separation, both in schools and residentially.

(2) S. 1647: Desegregation assignment and transportation "fails to account for the social science data indicating that racial and ethnic imbalance in the public elementary and secondary schools is often the result of economic and

sociologic factors rather than past discrimination by public officials."

Seattle: Residential segregation in Seattle, as in other major American cities, is far greater than can be explained by income levels, especially given the strong preference for residential integration expressed by most minorities. In Seattle, as in other cities, there is a long history of governmental decisions and action by government-regulated private interests which have had the effect of concentrating minorities residentially--*e.g.*, siting of low income housing, mortgage redlining, etc.

For several years before adoption of the Seattle Plan, schools in Seattle were increasingly identifiable as "minority schools" or "white schools," as racial imbalance grew rapidly. As the Supreme Court has noted, once a school becomes identified as a minority school, residential segregation near the school intensifies, since few white families move into an area where their neighborhood school will be minority segregated. With implementation of the Seattle Plan, the loss of white families in areas of substantial minority population has been slowed.

While it is true that some residential segregation is a result purely of individual choice, the court-mandated student reassignments which S. 1647 seeks to prevent have always been predicated on judicial findings of purposeful segregative action or inaction.

(3) S. 1647: Desegregation assignment and transportation "is not reasonably related or necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful, segregation because such segregation can be eliminated without such assignment and transportation." [S. 1147, § 2(b)(1) is identical.]

Seattle: It proved impossible in Seattle to eliminate segregated schools without resort to assignment and transportation of students away from neighborhood schools. For nearly 15 years Seattle attempted to desegregate using voluntary methods, but racial imbalance worsened steadily. Only with adoption of the Seattle Plan have the schools been desegregated. Clearly, adoption of a desegregation plan including mandatory reassignments was a last resort--no group of elected officials would consider the option of adopting a mandatory plan unless it was the only remaining alternative. There is no present alternative to busing except segregated schools, as courts have consistently found in other cities as well.

(4) S. 1647: Desegregation assignment and transportation "causes significant educational, familial, and social dislocations without commensurate benefits." [S. 1147, § 2(b)(2) is identical.]

Seattle: Seattle has not experienced significant educational, familial or social dislocations under the Seattle Plan. Certainly any dislocations are no greater than they would be in any voluntary desegregation plan which actually produced the amount of student movement necessary to desegregate. But more importantly, whatever dislocations may occur, the benefits of desegregated schooling outweigh them. The only realistic preparation for life in this pluralistic, democratic society is a strong basic education in a multi-ethnic setting. In recognition of this, the U.S. Supreme Court has unanimously stated that local school boards have the authority to adopt racial desegregation programs as a matter of educational policy. Segregated education is inferior to desegregated education, especially for minority students.

(5) S. 1647: Desegregation assignment and transportation "undermines community support for public education." [S. 1147, § 2(b)(3) is identical.]

Seattle: Community support for public education in Seattle remains high. School property tax levies have passed at the polls with near record margins of approval since adoption of the Seattle Plan. In School Board elections since adoption of the Plan, candidates supporting the Seattle Plan have defeated candidates opposing the Plan. Citizen involvement in school matters and support for schools remains intense, as evidenced by the high levels of public involvement in last spring's decisions to close several schools in a manner complementary to the desegregation plan and with minimum disruption.

(6) S. 1647: Desegregation assignment and transportation "is disruptive of social peace and racial harmony." [S. 1147, § 2(b)(4) is identical.]

Seattle: In Seattle racial harmony has been enhanced by school desegregation. It is the failure to desegregate which causes social and racial misunderstanding. It is only through extensive interracial contact beginning at an early age that young people can grow up less burdened by the racial stereotypes and prejudices which older Americans have carried.

(7) S. 1647: Desegregation assignment and transportation "has not produced an improved quality of education." [S. 1147, § 2(b)(5) is identical.]

Seattle: School desegregation has revitalized the educational program of the Seattle public schools. The numerous option and alternative educational programs which are part of the overall plan have added significantly to the diversity of educational experience in Seattle. Students' scores on standardized tests have risen modestly districtwide since the Seattle Plan began. In fact, achievement gains in the pairs and triads appear somewhat higher than gains in other schools. Perhaps the most important improvements in the quality of education have come in areas which are not so easy to measure on standardized tests. The job of the public schools is to prepare students for life as democratic citizens in this diverse society. This preparation includes the basic skills of reading, writing and math, but also firsthand experience with persons of different backgrounds which is essential to interracial understanding.

(8) S. 1647: Desegregation assignment and transportation "debilitates and disrupts the public educational system and wastes public funds and other resources." [S. 1147, § 2(b)(6) is identical.]

Seattle: Far from the debilitating the Seattle school system, adoption of the Seattle Plan has revitalized it. While there was a period of adjustment to the new attendance patterns in the Seattle Plan, the stability and predictability of assignment which students have under the Plan permits orderly planning on the part of parents for their students' education. School desegregation is not wasteful of public funds and resources, but rather is one of the most important investments of public funds that could possibly be made. Realistic preparation for productive adult life can help avoid the much larger future costs to society of continued discrimination, unemployment and crime.

Moreover, mandatory desegregation strategies inherently are more cost effective than voluntary strategies. In light of the higher costs of voluntary desegregation efforts, we note the apparent contradiction in those who urge purely voluntary programs of desegregation but simultaneously support the severe cuts in federal desegregation aid which are now occuring.

(9) S. 1647: Desegregation assignment and transportation "unreasonably burdens individuals who are not responsible for the wrongs such assignment and transportation are purported to remedy." [S. 1147, § 2(b)(8) is nearly identical, but ends "transportation seeks to remedy."]

Seattle: The long experience of voluntary plans in Seattle was one of minority students shouldering most of the burden or inconvenience of desegregation movement. Thus, as is true elsewhere in the country, failure to desegregate through a system which equitably distributes the inconvenience of movement among minority and majority students means that the minority victims of segregation are required to bear the brunt of trying to remedy that segregation, even though voluntary plans cannot possibly be effective. Since all races share in the benefits of desegregation, it is only fair that the inconvenience of desegregation be shared on an equitable basis as well.

(10) S. 1647: Desegregation assignment and transportation "infringes the right to racially and ethnically neutral treatment in school assignments to which students are, or ought to be, entitled." [S. 1147, § 2(b)(9), is identical but ends with the word "assignment[]".]

Seattle: In Seattle, as in most other major American cities, student assignment based purely on neighborhood residence would not be racially neutral, but a perpetuation of the racially discriminatory effects of past practices which have led to housing and school segregation. Only by taking positive action to overcome the effects of the past actions which have produced residential racial segregation can progress be made toward true racial neutrality. In the Seattle Plan, individual students are not assigned initially on the basis of their race, but rather according to their neighborhood. Predominately minority and predominately majority neighborhoods are combined to produce desegregated schools, but no individual student is singled out on the basis of race for mandatory reassignment. Voluntary desegregation strategies are inherently race conscious, because in order to have any positive impact on segregated schools they must regulate the school assignment of individual children purely on the basis of their race. Thus, S. 1147 would prohibit not only mandatory student assignment for desegregation, but also voluntary student reassignments.

(11) S. 1647: Desegregation assignment and transportation "has been undertaken without any constitutional basis or authority since the Constitution of the United States does not require any right to a particular degree of racial or ethnic balance in the public schools."

Seattle: While Seattle School District does not require a particular racial balance in each school, it is also mindful of the words of a unanimous Supreme Court in the Swann case ten years ago, where the Court stated that wholly apart from constitutional obligations, a school district could, for educational policy reasons, prescribe a ratio of minority and majority students in each school to provide students with realistic preparation for life in a pluralistic society.

* * * * *

S. 1147 contains one finding, at § 2(b)(7), which is not duplicated in S. 1647: Desegregation assignment and transportation "constitutes a serious interference with the private decision of parents as to how their children will be educated."

This contrasts with Seattle's experience, in which under the Seattle Plan parents have a wider choice of how their children will be educated than ever before. The only choice denied parents is the option of having their children educated in a segregated school. Numerous voluntary options--both program content and teaching style alternatives--are available as alternatives to initial assignments.

School assignment has never been a private parental decision. School officials have universally had the authority to assign students to appropriate schools for a host of reasons, including safety, overcrowding, and special educational programs, as well as for racial desegregation.

PREPARED STATEMENT OF HERB RULE

My name is Herb Rule. My wife and I have three sons, all of whom are in the Little Rock Public Schools, and all of whom have ridden the bus to schools outside of our immediate neighborhood. When they first began riding the bus, in the fourth grade, it was an exciting adventure for them. They liked the sound, the size and the power of those big yellow machines. The two older ones, both in high school, rarely ride the bus now because they have to be at school early for activities or stay late, and because it is decidedly uncool.

With all due respect, I must disagree with the assumptions in Senator East's bill. Desegregation in Little Rock has increased the contacts between children of different races. Little Rock now provides bus transportation for 11,000 students each day, a little over half of the district's enrollment.

Since busing began on a significant scale in 1971 and 1972, there has been a withdrawal by a number of white families from the public schools. But it has been a white trickle more than white flight. The percentage of white students in our district has declined about 2% a year over the last 5 or 6 years. A substantial part of the decline is due to the decreasing number of white school-age children in our district, but some significant portion of it is obviously the result of white parents removing their children from public schools.

Busing is not the reason they do it. Each of the predominantly white private schools in Little Rock has or arranges bus transportation for students and parents send their children as far, or sometimes farther, to these schools.

The withdrawal is due to fear and anxiety on the part of the parents who feel uncomfortable with their children at school in a different part of town and in classrooms with large numbers of black children. The children adapt more easily to new experiences with people of different background and color. If the people of this country are going to be stitched together as one nation, there must be contact with other races, cultures and religions. That is the way to develop mutual respect and understanding, and I don't see any other effective way to break the pattern of past separation than by having schools which reflect the cultural and racial makeup of the whole community.

In some places I suppose you could say that racial imbalance in public schools is the result of "economic and sociologic factors" but you could not say that in Little Rock or much of the country. In our case, by law a person went to one school if black, another if white, period.

Busing is not the culprit which has caused social dislocations, undermined community support for education or disrupted social peace and racial harmony. This nation has suffered these ills long before anyone tried to lay the blame on busing. What we never did before, and what is difficult to adjust to, is a commitment to educate all children of all races effectively. This was disturbing because before we could get about it, parents, teachers, school board members and children have to overcome the ingrained feeling that blacks were inferior and didn't take to formal education.

In Little Rock, and in many other places, we are doing this--educating disadvantaged children, black and white, effectively. Last year three to fifteen percent more black children in our schools performed at or above grade level in reading, math and language arts than had in the previous year. We have placed great emphasis on teaching all children to read and calculate. Our teachers have worked lovingly and forcefully to get tangible improvement from all of our students. It seems clear to me that we have improved the quality of education for blacks and whites in a desegregated school system which buses children to achieve racial balance. I was not aware of any "right to racially and ethnically neutral treatment in school assignment" under the constitution or laws of this country. That is a commendable utopian idea, but we shouldn't disown our history by ignoring the years of slavery and legally enforced segregation.

As I read it, Senator East's bill absolutely prohibits District Courts from requiring assignment of pupils or teachers to any school for the purpose of altering the racial or ethnic composition of the student body. This is directly contrary to the equitable power of federal courts to fashion a remedy for any constitutional violation. In Little Rock, the federal court provided repeated opportunities prior to 1972 for the School District to present ways to desegregate the schools, but the District did not respond with a thorough or effective desegregation plan. Only then did the Court intervene to order assignment and transportation of students to schools in proportions that would desegregate each of the 36 schools in our district.

The power to fashion appropriate remedies seems to be inherent in the constitutional grant of equity jurisdiction to federal courts. Although the bills all speak in terms of jurisdictional limitations, they are really encroaching on the inherent remedial powers of the courts.

In the face of declining enrollment in our schools, we are now engaged in a significant review of other ways of assigning children to schools that might lead to increased enrollment of white students. We are committed to a plan of internal reorganization and hope that it will be accepted by the majority of both black and white parents and students. The only way we can finally overcome the remnants of desegregation is by working together with mutual trust and understanding as a community to come up with school assignments that make sense educationally as well as constitutionally.

This bill gives no indication whether it is to apply retroactively to school districts like Little Rock which have worked out assignment and transportation plans under the general supervision of the courts for many years. Our last reorganization, in 1978, was formulated by a committee of black and white parents and, with slight modification, approved by the School Board. Although it has imperfections, it was accepted by most black and white patrons of the district, and there was no effort to have the court stop it. I hope that our new plan, to be implemented in the fall of 1982, will be as well received.

There are many of us in Little Rock who have worked hard over many years to achieve a truly desegregated school system that provides top quality education to all students. We have done this to make certain that every child has a fair and equal chance to gain the knowledge and skills needed to make a contribution to our community. Although divisions exist, we have become, more than ever before, one community. Black students have made notable advances in performance, and so have white students. I think this is because both races have gone to the same schools, had the same teachers, and benefitted from the same programs throughout the entire district. But the job still isn't over, because our students, black and white, still don't perform up to their potential.

I think this bill would restore division and segregation under color of law after nearly thirty years of thrust by the courts and Congress to eliminate divisions based on race. I assume that you, too, are committed to equal opportunity and elimination of dual, unequal school systems. This bill, and the others before you, attempt to prohibit or limit busing in the hope that this will cure the ills of public education. I can assure you it won't, and I look to you for meaningful proposals to improve the schools, increase respect between the races and provide a fair chance for all of our citizens.

PREPARED STATEMENT OF JANE B. SCOTT

Mr. Chairman, and members of the Separation of Powers subcommittee: My name is Jane Scott. I live in Mecklenburg County, North Carolina, of Swann vs. Charlotte-Mecklenburg Board of Education fame; a dubious distinction, I assure you. Having served on the above mentioned board for the first six tumultuous years of that landmark "Busing" Order, I have many first-hand recollections which I would like to share with you now.

So that you may have a better understanding of Charlotte's record in desegregation matters, prior to 1969, please note the following quotes taken from the brief of the Mrs. Robert Lee Moore, Et Al vs. Charlotte-Mecklenburg Board of Education, Et Al; case in the Supreme Court of the United States - October Term, 1970 - No. 444.

"Complaint":

"(9) That there are 106 schools in the Charlotte-Mecklenburg school system with a total enrollment of 84,542 children; that there are Negro children in attendance at all of these schools, except at 8 of them, and these 8 schools where no Negro children are now enrolled have an attendance of only 5,514 children as compared to the 84,542 children in the entire school system."

"(10) That white children constitute approximately 71%, and Negro children constitute approximately 29%, of all the children in the Charlotte-Mecklenburg school system, and thousands of white children and thousands of Negro children attend school ..... together."

"(12) That it has been judicially determined that in the Charlotte-Mecklenburg school system, each year any pupil is at liberty "to request assignment to another school"; that "no reason for transfer need be given"; and that "all transfer requests are honored", unless the school to which transfer is requested is "full".

"(13) That is has further been judicially ascertained and determined that, in the Charlotte-Mecklenburg school system, there is "no racial discrimination" in the expenditure of "money" or the "providing" of "Facilities"; and no "inequalities based upon racial motives" with respect to the "quality" of "teachers", or "books" or "school buildings" or "athletics" or "students"; that the Charlotte-Mecklenburg schools which are "apparently unsurpassed in these parts"; and that "the performance" of the Charlotte-Mecklenburg Board in this direction has "exceeded" that of "any school board whose actions have been reviewed in appellate court decisions"."

As further pointed out in the same brief, Charlotte-Mecklenburg was then about to be required to adopt an assignment policy which would assign children to schools solely"on account of their race and color", "and compulsion to attend prescribed schools will be imposed and throughout the future will continue to be imposed upon many thousands of children in Charlotte-Mecklenburg County", "solely on account of their race and color".

And so it was, that the Federal District Court (Judge James B. McMillan), upheld by the Supreme Court of the United States, did order that the Charlotte-Mecklenburg school system be desegregated - every school having, as nearly as possible, the ratio of "71% white" and "29% black students, thus reflecting the racial ratio throughout the Charlotte-Mecklenburg system. (Here-after to be referred to, in this report, as CMS) You will note also in the attached partial copy marked* "Civil Action, N. 1974 - Oct. 21, 1971, that we were prohibited from operating any school with a black population exceeding 50%, for any portion of the school year. This, the court assured us, could be controlled by not allowing student transfers for changes of residence, when the transfer would adversely affect the ratio of the sending or the receiving school. And in fact.... this reached a point of absolute absurdity when a student assigned to West Charlotte- (formerly all black High School) - moved, with his family,to Lake Norman in the far Northern section of the county. The student was not permitted to attend North Mecklenburg High School, but was instead transported to and from school at West Charlotte by a school system employee who had to drive 60 miles daily to accomplish the task! All because West Charlotte was on the verge of once more becoming predominantly black and the above student being white, was needed to satisfy the court's dictate on racial balance.

Please recall this is the school system that the same Federal District Court judge had referred to in Misc. No. 623 -- United States Court of Appeals for the Fourth Circuit - "Some Comment On Specific Issues", a) 4) "14,086 out of 24,000 or so black students attend school daily in all or almost all-black schools."...That The Number Of Black Students Attending Integrated Schools Had Increased From "A Few Dozen Out Of More Than 20,000" in 1964 To Nearly 10,000 In 1969 Was Apparently Lost On The Court....In this same document under the above heading - h) A Word About the School Board ... "The observations in this opinion are not intended to reflect upon the motives or the judgment of the School Board members". "They have operated for four years under a court order which reflected the general understanding of 1965 about the law regarding desegregation." "They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been reviewed in appellate court decisions...etc."

A simple "thank you" for a job well done, would have sufficed!!

COMMUNITY REACTION TO THE "BUSING" ORDER

The initial public response here might best be described as Disbelief! "He can't do that to us - or to our kids! "That's not justice - that's retribution!" etc. etc. Shortly the disbelief turned to anger and confusion. White people, and (quietly) some black people, began to organize what finally became a county-wide organization called the oncerned Parents Association. Immediately branded "racist" by the local media, the CPA worked almost 'round the clock to find a legal way to stop the court ordered chaos. From Legal Suits, to Boycott, to the final word from the Supreme Court, the CPA hoped and counted on relief, which of course never came. There was, however, not one act of violence nor any threat of violence attributed to the CPA or any of its members. I point that fact out, because news stories had constantly "painted" those people and that organization as "extremely racist".

*Attachment #1.

WHITE FLIGHT TO PRIVATE SCHOOLS AND BEYOND

In 1969 there were approximately 2,900 children in private schools in the Charlotte-Mecklenburg area. These were enrolled in Kindergarten through grade 12. Of the 16 private schools then operating, there were only three with significant enrollments, other than the Catholic Schools.

With the advent of the "Busing" order and the Supreme Court's sanction of it, private schools in existence found themselves with large waiting lists and new schools began appearing almost over-night. The ever increasing violence present in the public schools at that time, solidified the determination of many parents to remove their children from those schools, and those same parents stepped forward with offers of land, materials and skills needed to establish new private schools. At this time there are some 30 private schools operating in this area, and despite two financial recessions which have hit our part of the country with considerable force, the enrollments have steadily increased. Total private school enrollment, as best I can determine, is currently 9,050. Of that number, about 750 are black including 500 who are in Catholic schools.

Meanwhile, CMS has gone from a black ratio of 29% to a black ratio of 38%, and the membership statistics have dropped from 84,542 to 75,149-- 4,700 of which are in State funded kindergartens, not available in 1969. Considering the fact that during the 1960's, the CMS enrollment increased an average of 2,500 students per year-grades 1 through 12, the real drop in present membership is far greater than would at first be evident. Also, please note that the Charlotte-Mecklenburg Census figures were almost 50,000 greater in 1980 than they were in 1970.

Other surrounding county school systems and the nearby South Carolina school districts have grown in leaps and bounds during the last 10 years. You see, it is possible to live in South Carolina, and be able to reach Center-City Charlotte in fifteen to twenty minutes driving time. One only has to look at a demographic map to note the population shift of the last 10 years. This can hardly be explained away, as a "normal" migration pattern.

VIOLENCE IN THE SCHOOLS

The war-like atmosphere which pervaded our Junior and Senior High Schools shortly after the "Busing" began, made the teaching/learning process practically impossible. "Peace-keeping" became the order of the day, as school officials grappled with accusations of "unfair" and "biased" treatment from students and parents of both races. School administrators found themselves, frequently in District Court, defending their actions concerning suspensions and exclusions of students, stemming from the riots and vandalism in the schools.

The local press and other media were accused of "lying to the people" and "covering up" or "exaggerating" the true extent of the school disruptions, depending on the point of view of the accuser. To say that the atmosphere here was one of "distrust" is a vast understatement! Drastic measures were taken in the schools, to insure some degree of safety for the students. For example, bathroom lights were locked in "on" position, and mirrors were removed so that they could not be broken and used for weapons, as had been the case in numerous instances. Doors were removed from restrooms and teachers were stationed outside those rooms during certain times of the day, to try to assure maximum security for those students who might need to use those facilities. (Local physicians had been reporting a sharp increase in kidney disorders among the school-age population, during this time - a condition thought by some, to be caused by too infrequent use of the bathroom and not enough intake of fluids.) Other stress related illnesses were also on the rise among students, teachers and parents in this community.

Parents volunteers patrolled hallways and buses and the police were brought into close communication and contact with schools, on a day to day basis. *Special police procedures and observations are alluded to in the attached Newspaper clipping detailing a speech made by Chief of Police J.C. Goodman. The article only deals with a few of

*See Attachment #2 and #3

the situations, which were occurring on an almost daily basis in 1970 and 1971. Although the subsequent two years were somewhat more sporadic in their violent outburst, the "heat" and "volatility" were an ever present threat! School calendars were rearranged to allow for regular "cooling-off" days, at times in the year, thought to be the most likely trouble spots.

Our CMS Security Department was greatly increased in both personnel and equipment, such as two-way radios etc. Care was taken to assure the clear visibility of black, as well as white, security people.

One report from our Security Department which I requested and received in 1972, is inserted as attachment #3..... Please be aware that this report, in no way indicates any of the separate police work done by the Charlotte-Mecklenburg County Police Departments.

One policeman with whom I talked, following a riot at my son's high school, told me that he had served in Viet Nam, and had never been more scared than when he arrived at the school that day, and was confronted by students wielding bicycle chains, broken bottles, bats and bricks. Shortly after that incident, police were ordered to wear riot gear, when answering a "disturbance" call at a school. Consequently, they were accused of "over-reacting" and "inciting" trouble, by those in the community wishing to down-play the severity of the situation here.

REPORTS TO THE COURT

"Meanwhile back at the ranch," so to speak, the Administrators and Board Attorneys were ever busy with the preparations of the month by month "report to the court". Constantly shifting student populations and attendance problems were in no way, "natural" or "excusable" and in fact, were cited as evidence of on-going "dejure", "unlwaful discrimination".

The Board was ordered to adopt assignment policies which would assure stability of racial ratios throughout the entire CMS on an on-going basis. And once again the court expressed serious doubt as to the probability of "assignment based on residence" ever providing the guaranteed stability required by the court. Lottery selection was then suggested, and eventually put into practice for West Charlotte.

By the 1973-74 school year, the Board and the community had struggled through or with, as the case may be, several assignment plans. First the Court's "Finger Plan", named for the "expert" brought here by Judge McMillan. That plan was so frought with logistical problems that though approved by the court, the Board felt compelled to devise another plan, less expensive to the community both in monitary terms and human terms. Dr. Finger had left large areas of our CMS "unmoved" while placing long distance requirements on the people in other less fortunate areas. A comparison of the Finger Plan and the Board Plan (which evolved out of genuine concern for our community) follows. *See attachment #5 (especially pages 2 and 3)

The current plan was drawn up by a widely-based citizens' group known as the C A G, or Citizens Adviory Group. Busing opponents and proponents alike, with some exceptions of course, hailed the efforts of this group. Our community had grown exhausted and frustrated beyond belief, with the year to year adjustments required in each of the assignment plans, thus far. It seemed clear that we would forever be required to think and act racial ratios and balancing.

Our youngest and most precious citizens had been repeatedly called upon to make adjustments and sacrifices to the "god" of racial balance far above and beyond anything the adult population would have endured. Therefore, a plan which promised an even spread of the "punishment" of "busing" seemed the best that could be hoped for.

The courts assure us that all this is "for the good of the child". It will, we are told, bring equal protection of the law, out of the pages of the Constitution and into the realtiy of daily life. "Our black children will achieve on a par with their white counterparts - now that the blessing of desegregation has been "poured" down upon them." (Paraphrasing the court's observations in attachment #6, page 6.)

As previously stated, the current plan being followed is the one called the CAG Plan. For some of the background information on this - *See attachment #7

COMMUNITY RELATIONS AND THE SCHOOLS

Active from the very beginning of the massive "Busing"order, was the Community Relations Committee. There were regular reports to the Board suggesting changes needed within the CMS for better and smoother adjustment to the frequent changes which massive desegregation brings.

Community meetings were held and the results shared with the Board, the public and the courts. Such things were changed as student elections, which almost immediately, were racially balanced to assure minority representation at all levels of student government. Also racially balanced were elections for cheerleaders, majorettes, and lettergirls, etc. *See attachment #8

In-Service work shops for teachers were regularly held, dealing with all aspects of race relations.

Public Service announcements and entire programs were produced and shown not only on the Public TV station, but on the other local TV station, as well.

By 1979, the disturbances in the schools had greatly diminished and the focus was turning back to education. In fact, for several years there had been an intensive back to the basics thrust which had been demanded loudly, by parents throughout this our community.

Test Scores had declined greatly in the first few years of "Busing", though we were not permitted to publish separate racial scores. Therefore, we could only assume that the system-wide concentration on the under-achiever was working when the scores leveled off and began a slow rise... We had also switched tests, in 1978, making actual comparisions to earlier scores, impossible. With the adoption of the California Achievement Test, replacing the Stanford Achievement Test scores made a significant jump. The newspaper hailed the improved status of our children's education and we were told that "Busing" in Charlotte-Mecklenburg is a "shining success"! Various publications across the land joined the chorus of local praise.

Our Superintendent Jay Robinson, in testimony before a House judiciary subcommittee, is quoted as saying, "Our students' test scores rank well above national averages in all categories tested." and "school integration has significantly contributed to the good race relations and quality of life in Charlotte and Mecklenburg County."

PLEASE!!! See for yourselves, the school scores broken down by grade- race- subject tested and individual schools. As you can readily observe, our 9th grade black students are scoring below the National Average and drastically below 9th grade white students in the overwhelming majority of our 21 Junior Highs. For the Total Battery Averages - the 9th grade blacks are at 8.2 (8th grade-2nd month)
- the 9th grade whites are at 12.1 (12th grade-first month)
In virtually every category, the differential in the black and white scores is greater now, than when the Court Order of August 15, 1969 was written. Compare attachments #6 and # 9 (Test scores) Where is the success we are hearing about??? Where is the result that was, in effect, promised by the court in all its many orders, to the black parent and child??? Why have the school system and the court been unwilling to admit that they do not have ready answers to the achievement puzzle which has plagued us and countless others for so long???

Recent studies by sociologists, including James Coleman -author of the original Coleman Report - "godfather" of "forced busing" - indicates that the importance of parents as motivators of their children, where school studies are concerned, seems to far outweigh most of the other influences in the child's life. This applies to kids of all races. To ignore this - and blindly carry-on these forced racial assignments is to tell the black children of this nation, that they don't really matter after all!!! Unfortunately the courts do not seem inclined to admit their mistake and the civil rights attorneys who have profitted enormously by these actions have much to lose, in terms of personal gain, should sanity be returned to the business of school assignments.

There certainly is no hard evidence to support the idea that the 7,749 volunteers who donated 128,689 hours of their time to tutor children who were achieving below grade level, would simply turn their backs on those children if their school assignments were close to their homes (dare I say it -- "neighborhood schools"). In fact, there is every likelihood that these same people would be willing and able to work with interested parents who haven't yet been told how desperately their kids need them to be interested in their educational accomplishments.

There have been successful such projects, like Home - Start, devised and operated under the guidance of Ralph Scott, Ph. D., Director of the Educational Clinic at the University of Northern Iowa. There are other resources such as Marva Collins, of Chicago, who has worked a sort of "miracle" in the learning lives of black kids who were given up-on by the Chicago Public Schools. It can and will be done!! Only when you take back the powers vested in you by the Constitution of the United States, which have been usurped by the courts, these many years!! As you undoubtedly know, Congress has the clear power to limit remedies under Section 5 of the 14th Amendment. I respectfully request that you do so and that you use your power under Article III, Section 2 and other portions of the Constitution, to stop courts from coercing racial balance in the schools.

The children are waiting! Please don't procrastinate in coming to their relief. They have been riding the bus down that "road paved with good intentions" and empty promises, too long.

Attachments.

ATTACHMENT 1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil Action No. 1974

OCT 21 1971
[illegible] Clerk
[illegible] Court
U. S. [illegible]
[illegible] N. C.

JAMES E. SWANN, et al., Plaintiffs,

-vs-

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al., Defendants.

MEMORANDUM OF DECISION AND ORDER

James B. McMillan, District Judge

been allowed to go "all the way." If the plan shows no promise of keeping the schools reasonably stable, the adoption of the plan may as to the formerly black schools be only an exercise in statistics and map-making. If it does show promise of keeping the schools reasonably stable, then we may be approaching the day when unconstitutional discrimination will be ended and the case can be terminated.

The defendants since February 5, 1970, have been subject to orders of this court which, as amended on August 3, 1970, read as follows:

* * *

> "5. That no school be operated with an all-black or predominantly black student body.
>
> * * *
>
> "9. That the defendants maintain a continuing control over the race of children in each school, just as was done for many decades before *Brown v. Board of Education*, and maintain the racial make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable.
>
> "10. That 'freedom of choice' or 'freedom of transfer' may not be allowed by the Board if the [cumulative] effect of any given transfer or group of transfers is to increase [substantially] the degree of segregation in the school from which the transfer is requested or in the school to which the transfer is desired.
>
> "11. That the Board retain its statutory power and duty to make assignments of pupils for administrative reasons, with or without requests from parents. Administrative transfers shall not be made if the [cumulative] result of such transfers is to restore or increase [substantially] the degree of segregation in either the transferor or the transferee school.
>
> "12. That if transfers are sought on grounds of 'hardship' race will not be a valid basis upon which to demonstrate 'hardship.'
>
> "13. That the Board adopt and implement a *continuing program*, computerized or otherwise, of assigning pupils and teachers *during the school year as well as at the start of each year* for the conscious purpose of *maintaining each school and each faculty in a condition* of desegregation."

ATTACHMENT 2

Chief Goodman's School Statement

Charlotte Police Chief J. C. Goodman sent the following statement concerning Oct. 27 and 29 disturbances in schools Monday to Mayor John Belk, members of the City Council and City Manager David A. Burkhalter.

Gentlemen:

During this past week two schools had problems that involved sizeable numbers of police and students. On Wednesday, Oct. 27, a group at Myers Park High School who were apparently demonstrating against the exclusion of several students earlier, went on a rampage that left 22 people injured and a considerable amount of damage done to the school. Two of the students injured remained in the hospital due to the seriousness of their wounds. Five police officers were injured; the most serious of which required six stitches to close a wound in his head that resulted from being struck by a two-by-four thrown by one of the students.

On Friday, Oct. 29, a disruption occurred at South Mecklenburg High School in the county. This group broke windows and threw eggs as they moved through the campus. Fortunately, there were no serious injuries as a result of this disturbance.

City police officers were requested by the county to provide assistance at this disturbance. The new cooperative agreement which was recently established by the City Council and the County Commissioners, allows the City Police Department to respond to a call for assistance from the County Police with a minimum of red tape. A request can be made directly from one department to the other. At South Mecklenburg the Charlotte Police Tactical Unit was dispatched under this procedure when assistance was requested from a county police supervisor.

After the principal of the school ordered the group to either attend classes or leave the campus, and they did neither, 21 arrests were made for

See HERE, Pg. 5B, Col. 1

various offenses. Seventeen of these arrests were made by city officers.

The new cooperative agreement between the county and the city police departments has proved valuable. This procedure significantly reduces the time necessary to answer a call for assistance from the Mecklenburg County Police. This agreement has resulted in greater manpower being available to both departments when necessary.

In addition to these two schools, there were minor disturbances at Quail Hollow Junior High, East Mecklenburg High School, and Piedmont Junior High School. There were also numerous bomb threats at schools scattered throughout the system.

Before I go any further I would like to make it clear that these disruptions, damages, and injuries were caused by a small portion of the student bodies. At Myers Park there were about 200 people out of a total enrollment of 2,286 who engaged in the rioting. The majority of the students did not in any way participate in the activities that occurred. These students have earned and deserve the commendations and respect of all people. They acted in a most responsible manner and deserve credit for their actions. It is unfair for anyone to blame all students for the behavior of a few.

It cannot be said that the incident at Myers Park was anything less than a riot. The injuries that resulted from this irresponsible conduct were very serious; we were all fortunate that no one was more seriously injured or killed because the possibility was certainly there.

During the Myers Park incident further arrests were not made at that time even though a considerable number of those responsible for injuries and destruction were positively identified by officers on the scene. It was felt that the mob and the situation were too explosive. There was too great a possibility of further damage and injuries.

Seven students were arrested at the scene and warrants are being served on a number of others today (Monday). Some of these warrants charge the felony of riot which carries a possible punishment of $10,000 fine and-or five years imprisonment. This is no more than is necessary to bring to adequate justice those who endanger life so freely and willingly.

The role of the police department in any situation such as this is to protect lives and property. This task calls for a great deal of patience and skill. Those officers who answered these calls and others at schools during the last two years have acted with admirable restraint and have dealt successfully with all situations.

Our general policy and procedure remains as it has for the last two years. When a distubrance at a school is reported, unless it is at that time a major one, plainclothes police officers are dispatched to assess the situation. If further help is needed it will be sent. If these officers can handle the situation they do so. Should the disturbance be a major one with threat to life or property, then the closest available uniformed officers will be dispatched. Our policy is to use as much manpower as is necessary to insure the safety of all. It is sound procedure to have a sufficient number of officers present to protect people and school campuses in incidents of this nature.

The Tactical Units of our department has been extremely useful. These officers, who are highly trained and skilled, have been used in many school incidents. They can be sent to a school without depleting our field officers who regularly patrol the city.

This year we have found the helicooter to be an invaluable aid. From it we can see the movement of crowds. We can see and warn the officers in the ground of additional disturbances nearby. It can and does respond rapidly to these situations and allows us to be present in a very short time. The helicopter has also been helpful in another frequent situation that occurs during these disturbances. As you know there are often rumors o ftrouble at several schools at the same time. We can dispatch the helicopter to determine if there is a disturbance in progress. Several times we have been able to discover that there was no disturbance. Rumors of movements of people from one school to another can also be checked. In fact, the thelicopter can and does patrol all of the schools in a matter of minutes.

All of the planning and coordination between the school officials and police has paid off. There have been many meetings to discuss procedures, policies, and responsibilities, and we are in telephone contact daily. These cooperative efforts will continue.

Before I close I would like to be certain that all people understand the postion of the police department. Violence such as has occurred cannot be tolerated. The lives and safety of too many are involved and those who engage in riotous acts will answer in court for the damages and injuries that occur. The potential for having someone killed during this violence is too great to ignore. The police have a tremendous responsibility in these situations. We are, as in most civil disturbances, "in the middle" and subject to criticism from some factions regardless of our actions.

Our goal, as previously stated, is to protect life and property. This we intend to do to the best of our ability by taking those responsible into the courts for disposition. Your continued support of our efforts are indeed appreciated.

I thank you for this opportunity to update you on the current situation in our schools. If iyou have any questions, I'll be glad to answer them.

ATTACHMENT 3

CHARLOTTE - MECKLENBURG SCHOOLS

[illegible]

March 2, 1972

Mrs. [illegible]
100 [illegible] Drive
Charlotte, North Carolina 28214

Dear [illegible]:

In compliance with your request of March 2, 1972, the following is submitted for your information:

1. [illegible] SCHOOLS AND IN THE INVESTIGATION OF [illegible] DISRUPTION BY SECURITY:

   September, 1971 -- 156 hours
   October, 1971 -- 79 hours
   November, 1971 -- 115 hours
   December, 1971 -- 10 hours
   January, 1972 -- 17 hours
   February, 1972 -- 129 hours
   TOTAL -- 506 hours

2. NUMBER OF [illegible] BOMB-THREAT CALLS RECEIVED DURING 1970-1971-- 173

3. NUMBER OF [illegible] BOMB-THREAT CALLS RECEIVED DURING 1971-1972-- 98

4. There were no records maintained on bus incidents, including fights and objects thrown at and from buses, until January, 1972.

   January, 1972 -- 7 incidents investigated
   February, 1972 -- 6 incidents investigated

Neither the [illegible] nor the Security Department has accurate records on the [illegible] of times the police have responded to, or have been [illegible] to the vicinity of schools because of disruptive acts and tension. It might be possible to obtain this information by calling Captain Bartlett of the County Police Department, telephone number 374-2347 and Chief Ken Miller of the City Police Department, telephone number 374-2345.

We hope that this information will be helpful to you. If there are further questions or more information needed, please call us.

Very truly yours

Roland M. Smith,
Director of Security

RMS/c

ATTACHMENT 4

March 6, 1972

CHARLOTTE-MECKLENBURG SCHOOLS

Transportation Department

[illegible] Loading and Unloading Schedules

Morning

Grade Level	School	School Schedule	Earliest Students Loaded
Senior High	[illegible]	7:30 - 2:10	6:05 A. M.
Junior High	[illegible]	8:00 - 2:45	6:10 A. M.
Elementary	[illegible]	8:00 - 2:30	6:30 A. M.

Afternoon

Grade Level	School	School Schedule	Latest Students Discharged
Senior High	South Mecklenburg	8:20 - 3:25	5:00 P. M.
Junior High	J. T. Williams	8:15 - 3:15	4:50 P. M.
Elementary	[illegible]	8:55 - 3:25	4:20 P. M.

Morgan

ATTACHMENT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al, Plaintiffs,

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al, Defendants

Civil Action No. 1974

AFFIDAVIT OF J. D. MORGAN, ASSISTANT SUPERINTENDENT FOR BUSINESS SERVICES OF THE CHARLOTTE-MECKLENBURG PUBLIC SCHOOLS

J. D. MORGAN, being duly sworn, deposes and says that:

1. I am Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools, and am responsible for the administration and operation of the school bus transportation system of the Charlotte-Mecklenburg Schools.

2. All statistical data and information attached hereto or referred to herein were prepared by me or under my direct control and supervision, are incorporated as a part of this Affidavit and correctly set forth the facts and estimates to which they refer.

3. I am thoroughly familiar with the bus transportation system for the Charlotte-Mecklenburg Schools as it is presently being operated and with the Board Plan and the Finger Plan for desegregation which were in evidence at the February 5, 1970, hearing and referred to in the Court's Order of the same date. I have made a careful, detailed analysis of both of those Plans and alternate proposals, particularly with reference to their effect upon transportation of students, bus routes and schedules, transportation costs, availability of facilities and related matters.

4. Under North Carolina law and applicable regulations as they apply to the Charlotte-Mecklenburg School System any school child is entitled to free transportation to and from the school he attends if he resides more than 1½ miles from his school and (a) if he resides in the part of Mecklenburg County located outside the Charlotte city limits as they existed immediately prior to the 1957 annexation or (b) if he resides in the City and attends a school located within that portion of the County. Based on December 1, 1969, records, 22,545 children were being transported pursuant to the State law by a fleet of 267 school buses. In addition, the System is presently furnishing with local funds 13 buses to transport the 738 black students who accepted assignments to outlying white schools when certain inner city schools were closed last year. In the aggregate, the Charlotte-Mecklenburg Schools has a fleet of 230 buses which now transport daily 23,283 students.

5. The Board Plan proposes to provide transportation for those children who are eligible under the present State law. The Finger Plan proposes to provide transportation for all students not within walking distance of their school, regardless of the location of their residence or the schools they attend. The Board has accepted the State standard for walking distance as being less than 1½ miles. Either of the proposed plans for desegregation will require buses and expenditures in addition to the 280 buses presently being used to transport 23,283 students. A summary of pertinent data, including the additional children, buses and costs which would be required under each desegregation proposal is as follows:

	Board Plan	Finger Plan
No. of Children Bussed	4,935	23,384
No. of Buses	104	526
No. of Trips Daily	104	526
Aver. No. Trips Daily	1	1
Aver. No. Pupils Per Trip	47	44
Aver. No. Miles Daily	30	30
Total Mileage Daily	3,120	15,780
Aver. Per Pupil Cost Annually	$ 29.29	$ 31.26

	Board Plan	Finger Plan
Cost of buses	$ 589,889.56	$2,947,048.94
Cost of Parking Lots, Etc.	56,200.00	337,400.~~98~~00
Cost of Operating	175,627.92	888,271.98
Cost of Personnel	42,960.00	177,120.00
Total Cost	$ 864,677.48	$4,349,840.92

From the foregoing it will be observed that, compared with existing transportation, the Finger Plan adopted by the Court will double the number of children bussed (an increase from 23,283 to a total of 46,667) and almost triple the number of buses required (an increase from 280 to 806). Supporting details for this summary are shown on attached Schedules Nos. 1 and 2. In each instance the additional requirements tabulated above are based upon the System's experience regarding the number of students who actually use such transportation--rather than the much larger number who are eligible therefor.

6. For the most part, the school buses are driven by high school students recruited by the high school principals and are paid the $1.60 per hour minimum wage prescribed by State law for student drivers. Student drivers are presently in very short supply as are also the extra substitute relief drivers which we must have in case of the illness or absence of regular drivers. A student driver parks his bus at his home overnight. In order to minimize unnecessary mileage, wherever possible a student driver is assigned a bus route that begins near his home. On the morning of each school day he starts his student pick ups near his home and continues on his route until he deposits the children at the school served by the route. All buses, by State law, must be routed within a mile of a student's home. In most instances, it is necessary for a bus to be routed off main streets and roads to pick up points less than a mile for two reasons: First, to insure safety in loading and unloading students and secondly, to provide for better traffic safety and flow for the general public. If a bus route is not too long, the driver will be assigned a second route or trip. This

File
Paw Creek

ATTACHMENT 6

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

Civil Action No. 1974

FILED

AUG 15 1969

[illegible]

JAMES E. SWANN, et al, Plaintiffs,

-vs-

THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; MR. WILLIAM E. POE, CHAIRMAN; MR. HENDERSON BELK; MR. DAN HOOD; MR. BEN F. HUNTLEY; MRS. BETSEY KELLY; REV. COLEMAN W. KERRY, JR.; MRS. JULIA MAULDEN; MR. SAM S. McNINCH, III; DR. CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants.

O R D E R

CONRAD O. PEARSON, 203-1/2 . Chapel Hill Street, Durham, North Carolina; J. LeVONNE CHAMBERS, ADAM STEIN, JAMES E. FERGUSON, II and JAMES E. LANNING, 216 West Tenth Street, Charlotte, North Carolina; JACK GREENBERG, JAMES M. NABRITT, III, and NORMAN CHACHKIN, 10 Columbus Circle, New York, New York; and GASTON H. GAGE, Law Building, Charlotte, North Carolina; and PAUL L. WHITFIELD, WHITFIELD, McNEELY & ECHOLS, 901 Elizabeth Avenue, Charlotte, North Carolina, Attorneys for Plaintiffs.

BROCK BARKLEY, 820 Law Building, Charlotte, North Carolina; WILLIAM J. WAGGONER, WEINSTEIN, WAGGONER, STURGES & ODOM, 1100 Barringer Office Tower, Charlotte, North Carolina; ROBERT MORGAN, Attorney General; RALPH MOODY, Deputy Attorney General; and ANDREW A. VANORE, Staff Attorney, State of North Carolina, Raleigh, North Carolina, Attorneys for Defendants.

Before JAMES B. McMILLAN, District Judge

THE SCHOOL BOARD'S NEW PLAN REPRESENTS SUBSTANTIAL PROGRESS:

Against this background the Board's new plan is reviewed:

1. The most obvious and constructive element in the plan is that the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teacher principals and staff members "at the earliest possible date." It has recognized that where people live should not control where they go to school nor the quality of their education, and that transportation may be necessary to comply with the law. It has recognized that easy methods will not do the job; that rezoning of school lines, perhaps wholesale; pairing, grouping or clustering of schools; use of computer technology and all available modern business methods can and must be considered in the discharge of the Board's constitutional duty. This court does not take lightly the Board's promises and the Board's undertaking of its affirmative duty under the Constitution and accepts these assurances at face value. They are, in fact, the conclusions which necessarily follow when any group of women and men of good faith seriously study this problem with knowledge of the facts of this school system and in light of the law of the land.

2. In the second place, by the following actions the Board has demonstrated its acceptance of its stated new policies:

a) The desegregation of faculties and the non-racial reassignment of principals and employees from newly closed schools. In the formerly all-black faculties the Board has dramatically exceeded its goal. It is assumed by the court that this process of faculty desegregation will continue and that the goal for 1970-71 will be that faculties in all schools will approach a ratio under which all schoo in the system will have approximately the same proportion of black and white teachers.

b) The closing of seven schools and the reassignment of 3,000 black pupils to schools offering better education.

c) The reassignment of 1,245 students from several overcrowded primarily black schools to a number of outlying predominantly white schools.

d) The announced re-evaluation of the program of locating and building and improving schools, so that each project or site will produce the "greatest degree of desegregation possible."

e) The Board correctly and constructively concluded that the so-called "anti-bussing law" adopted by the General Assembly of North Carolina on June 24, 1969, does not inhibit the Board in carrying out its constitutional duties and should not hamper the Board in its future actions. Leaving aside its dubious constitutionality (if it really did what its title claims for it), the statute contains an express exception which renders it ineffectual in that it does not prevent "any transfer necessitated by overcrowded conditions or other circumstances which in the sole discretion of the School Board require reassignment."

f) The elimination without objection of the former provision which had the effect of inhibiting transfer rights of black would-be athletes.

g) Quite significantly, the Board calls upon the Planning Board, the Housing Authority, the Redevelopment Commission and upon real estate interests, local government and other interested parties to recognize and share their responsibility for dealing with problems of segregation in the community at large as well as in the school system.

h) The proposals for programs of "compensatory education" of students, and for teacher orientation and exchange of activities among black and white students. The court assumes that these somewhat vaguely stated ideas will become implemented with concrete action.

3. The Seven School Problem. -- The Board plan proposes to close Second Ward High School, Irwin Avenue Junior High School and five inner-city elementary schools (five of which were already marked for abandonment) and to reassign their 3,000 students to outlying white schools. This part of the plan has struck fire from black community leaders and some other critics. Counsel for the plaintiffs contend that it puts an unconstitutional and discriminatory burden upon the black community with no corresponding discomfort to whites. One spokesman for a large group of dissenting and demonstrating black citizens was allowed to express his views at the August 5, 1969 hearing. Threats of boycotts and strikes have been publicized.

This part of the plan is distasteful, because all but 200* of the students being reassigned en masse are black. It can legitimately be said and has been eloquently said that this plan is an affront to the dignity and pride of the black citizens. Pride and dignity are important. If pride and dignity were all that are involved, this part of the plan ought to be disapproved. The court, out of forty-year memory of four years of transportation on an unheated Model-T school bus thirteen miles each way from a distant rural community to high school in a "city" of 4,000, is fully aware how alien and strange are the sensations experienced by a school child who is hauled out of his own community and into a place where the initial welcome is uncertain or cool.

The "abused child" grows up to become the "abuser" of Children

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*The 200 students being reassigned from Paw Creek to Woodland are white.

However, this part of the plan is not compulsory. Students who want to remain in the comfort of their familiar area may elect to attend the Zebulon Vance School instead; alternatives are also provided for the junior high school students.

Moreover, as one of the attorneys remarked at the first hearing in a discussion about reassignments and school busses: "The question is really not one of 'bussing' but whether what the child gets when he gets off of the bus is worth the trouble."

I personally found the better education worth the bus trip.

Despite their undoubted importance, pride and dignity should not control over the Constitution and should not outweigh the prospects for quality education of children. The uncontradicted evidence before the court is that segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children. By way of brief illustration a table follows showing the contrasting achievements of sixth grade students in five of the closed schools (Bethune, Fairview, Isabella Wyche, Alexander Street and Zeb Vance) and in five of the schools to which black students are going to be transferred:

– Attachment –
Scores (Fair scores above
all the other white schools
All achievement in math is
below national norm – 6 grade
Test used –
Stanford Achievement

AVERAGE ACHIEVEMENT TEST SCORES
SIXTH GRADE - 1968-69

	SR.	LANG.	ACM. (Math.)	WM (Word Meaning)
(Bethune	45	34	41	41
47% (Ashley Park	61	62	56	58
(Fairview	46	38	42	39
8% B (Westerly Hills	61	61	52	57
(Isabella Wyche	41	34	40	38
(Myers Park	80	84	58	73
(Alexander Street	45	38	34	40
(Shamrock Gardens	57	62	53	56
(Zeb Vance	38	34	39	42
(Park Road	71	75	58	66

This alarming contrast in performance is obviously not known to school patrons generally.

It was not fully known to the court before he studied the evidence in the case.

It can not be explained solely in terms of cultural, racial or family background without honestly facing the impact of segregation.

The degree to which this contrast pervades all levels of academic activity and accomplishment in segregated schools is relentlessly demonstrated.

ATTACHMENT 7

Help Sought For School Plan

Continued from Page 1A

for the new task Wednesday, the membership had started thinking about an alternate assignment plan. Mrs. Ray said the group generally preferred the proximity plan (a new school staff idea to send more children to the schools nearest their homes), which never was developed fully.

Mrs. Ray said the group would set to work on both recommendations for adjustment to the board's proposed "feeder" plan and an alternate plan.

THE CAG membership did not endorse the feeder plan. Among its faults, the group felt, were high black student ratios for several schools, heavy busing of black kindergarten children and the lack of "objective rationale" for choosing which schools would be paired.

(The board's feeder plan groups elementary, junior and senior high schools into attendance districts so that students "feed" together from one school level into the next. The plan also "pairs" inner-city and white suburban schools and some satellite districts.)

The CAG represents all areas of the city and county and all shades of the political spectrum. It was formed last fall to help define "fairness" and "stability" as applied to pupil assignment and to try to find a community consensus on these points

The group, now independent, was created by the Quality Education Committee, a private group which has worked to improve Charlotte - Mecklenburg Schools.

THE CAG developed a set of nine guidelines to define "fairness" and "stability," but none of those recommendations is apparent in the board's plan.

The CAG guidelines asked that busing be equalized where possible, that integrated areas have walk-in schools where possible and that the black pupil ratio range from 20 to 45 per cent in schools and white ratios range from 80 to 55 per cent.

The group asked that secondary students be given some preferences and options in assignment, and that racial ratios for children in kindergarten through grade three be flexible to reduce long bus rides for the very young.

To improve stability, it asked that new schools be built with an eye toward alleviating the integration problem, that changes in assignments affect primarily students who are changing school levels and that the transfer policy be broadened.

It asked that an attendance area be declared saturated when a school reached 45 per cent black or 80 per cent white, and that, when that happened, newcomers be sent to another school for the rest of the year.

(CAG) Plan

Citizens Panel To Help Devise School Plan

By NANCY BRACHEY
Observer Staff Writer

After five years of wrestling with the Charlotte - Mecklenburg Board of Education over school desegregation, U.S. District Judge James B. McMillan asked a group of private citizens Wednesday to help devise a new desegregation plan.

The United States district judge invited the Citizens Advisory Group (CAG), a five-month-old committee representing all areas of the county and diverse viewpoints to recommend changes in the plan the board has submitted to him.

The CAG accepted the invitation almost immediately.

THE 25-MEMBER committee considered McMillan's request at a private meeting Wednesday night and chairman Margaret Ray said the challenge was accepted unanimously and "with enthusiasm."

Mrs. Ray said the CAG feels, "after months of studying pupil assignment, that a fair and stable plan can be devised which will satisfy the majority of the community."

McMillan asked the group to comment on the board's proposed plan at hearings which will begin in his court April 15.

But, perhaps more importantly, he asked the group to say how its recommendations on pupil assignment fairness and stability — made to the board Feb. 11 and almost entirely ignored — could be added to or substituted for the board's proposal.

Board attorneys told McMillan on Monday that the Board's proposed plan did not include a mechanism for stabilizing the racial makeup of the schools because the board didn't believe the Constitution required it to maintain racial stability. The board refused to furnish any information to the judge on that point.

BOARD ATTORNEYS said also that if McMillan pressed that point, the board would appeal.

To this, McMillan responded in a five-page order issued Wednesday afternoon:

"It is a possible interpretation of this response that defendants are more interested in litigation than in fairness and stability," the federal judge said. "In any event, they have again defaulted in an obligation to the community and to the school patrons (in addition to the long-standing default in compliance with the orders of court).

"It is also apparent," McMillan added, "that with the board thus dedicated it would be an idle exercise to direct defendants to require their staff, unaided, to produce effective plans to eliminate the discrimination which remains, or to address themselves to the unfairness which on the presently incomplete record, appears manifest in many phases of the proposed pupil assignment plan."

Even before McMillan gave the CAG increased standing and responsibility by tapping it

See HELP Page 9A, Col. 1

ATTACHMENT 8

These ELECTION PROCEDURES are still the practice in the CMS; and the subject of resentment on the part of many students who feel that they fly in the face of "Democratic Process".

Recommendations for the 1972-73 Student Elections

At a joint meeting of the senior high school principals and the Charlotte Student Coordinating Council on Monday, March 6, 1972, recommendations were made and voted on by the two groups. The following is a summary of those recommendations.

Student Council Elections--Executive Committee

There should be a percentage of at least 1/3 black and 1/3 white students on the governing body, be it called student council congress, student council officers or student council executive committee. The elections of these officers should be held in the spring of the 1971-72 school year.

The size of the body, as well as nomination procedures, and other aspects of student council elections should be left up to the individual schools.

Class Officer Elections

There should be five (5) class officers with at least 2 black and 2 white students for each grade level: 10, 11 and 12. The election of the 11th and 12th grade officers for the 1972-73 school year should be held this spring. All other aspects of the elections should be left up to the individual schools.

Cheerleaders

The election of varsity cheerleaders should be held this spring by using the same guidelines as for the 1972-72 school year.

The selection of majorettes and lattergirls should be the same as last year, but to be selected in the spring of this school year.

The election of junior varsity cheerleaders should be the same as for the 1971-72 school year, but to be held in the fall of 1972-73.

ATTACHMENT 9

4D The Charlotte News, Wednesday, July 15, 1981 • • • • •

COUNTY CAT TEST SCORES

9/30/80 Schools % place	School	Total Membership 9/30/80	Grade	Total Reading Black GE	Total Reading Black %ile	Total Reading White GE	Total Reading White %ile	Total Math Black GE	Total Math Black %ile	Total Math White GE	Total Math White %ile	Total Language Black GE	Total Language Black %ile	Total Language White GE	Total Language White %ile	Total Battery Black GE	Total Battery Black %ile	Total Battery White GE	Total Battery White %ile
	(GE indicates grade equivalent)																		
46	Albemarle Road	657	3	2.8	25	4.6	75	3.4	34	4.6	79	2.9	29	4.7	73	3.2	27	4.7	79
43	Allenbrook	422	3	3.1	31	4.0	62	3.7	48	4.5	75	3.7	51	6.5	81	3.5	40	4.5	74
42	Ashley Park	347	3	3.6	47	4.0	60	4.0	60	4.3	68	3.8	54	5.0	78	3.8	53	4.3	68
23	Bain	834	3	2.6	21	4.6	75	3.4	33	4.5	75	3.2	36	5.5	80	3.1	27	4.7	78
43	Berryhill	518	3	3.2	35	3.5	43	3.6	46	3.8	53	3.7	51	4.1	58	3.5	41	3.7	49
41	Beverly Woods	463	3	3.6	47	5.4	88	3.9	58	5.0	87	4.3	65	6.8	88	3.8	55	5.4	90
43	Billingsville	462	3	3.2	35	4.5	72	3.9	56	4.7	81	3.5	44	5.4	79	3.6	46	4.8	81
56	Briarwood	758	3	3.5	42	4.0	60	4.0	58	4.6	78	4.1	58	4.8	74	3.7	52	4.4	73
44	Chantilly	406	3	2.9	28	3.8	54	3.7	48	4.2	65	3.4	42	4.3	65	3.4	37	4.0	62
17	Clear Creek	709	3	3.7	50	4.5	72	3.8	53	4.6	79	3.8	53	5.3	79	3.7	51	4.7	79
34	Collinswood	381	3	3.9	57	4.5	72	4.2	65	4.6	78	4.9	74	6.3	86	4.2	66	4.8	82
23	Cornelius	544	3	3.0	30	4.0	62	3.9	55	4.3	68	3.3	37	4.4	67	3.5	40	4.2	67
35	Cotswold	429	3	3.1	32	4.8	78	3.6	47	4.8	83	3.4	40	5.9	84	3.5	39	5.0	84
38	Davidson Very Rural	253	3	3.1	33	4.8	77	3.4	36	4.4	70	3.5	44	5.5	81	3.4	35	4.8	77
44	Derita	763	3	3.3	36	4.3	68	3.6	43	4.3	68	3.3	39	4.4	67	3.4	37	4.3	69
41	Devonshire	528	3	2.7	23	3.9	57	3.5	41	4.2	66	3.1	33	4.2	62	3.3	32	4.1	62
38	Dilworth	560	3	4.0	60	5.4	86	4.1	64	5.0	87	4.6	69	7.0	91	4.1	64	5.4	90
29	Eastover	706	3	2.7	25	4.9	79	3.4	33	4.7	82	2.9	29	5.9	83	3.1	27	5.0	85
37	Elizabeth	489	3	4.2	67	5.3	85	4.3	67	4.8	84	5.0	76	6.5	88	4.3	71	5.3	88
46	Enderly Park	326	3	3.2	34	4.0	59	3.6	48	4.0	60	3.9	58	4.4	66	3.5	42	4.0	61
22	J.H. Gunn	621	3	3.4	41	4.5	73	3.7	49	4.5	74	3.9	56	5.0	78	3.6	47	4.6	76
26	Hickory Grove	820	3	2.6	22	4.6	75	3.5	38	4.8	83	3.4	42	6.2	86	3.3	31	4.9	83
* 91	Hidden Valley	980	3	3.5	42	3.3	38	3.9	58	3.9	55	3.8	54	3.6	46	3.7	50	3.6	47
45	Highland	329	3	2.7	24	3.4	41	3.5	40	3.7	52	2.8	27	3.2	34	3.2	28	3.5	42
34	Huntersville	562	3	3.3	36	4.3	68	3.8	44	4.3	69	3.4	42	4.6	70	3.5	39	4.4	71
37	Huntingtowne Farms	417	3	3.5	43	5.0	81	4.0	63	4.9	86	4.1	60	6.3	86	3.8	56	5.2	87
38	Idlewild	474	3	3.4	41	4.3	67	3.7	49	4.2	65	3.6	47	4.7	72	3.5	43	4.3	68
34	Irwin Op. Open	522	3	3.3	37	4.9	80	3.5	38	4.7	81	3.5	43	6.2	86	3.4	38	5.0	85
51	Lakeview	319	3	3.2	33	3.9	58	3.8	56	4.4	71	3.6	40	4.6	71	3.6	45	4.3	65
38	Lansdowne	785	3	3.1	33	4.9	80	3.7	51	5.1	88	3.5	45	6.6	88	3.5	42	5.3	88
40	Long Creek	682	3	3.4	41	4.3	67	3.7	50	4.4	71	4.2	62	5.5	81	3.7	48	4.5	73
23	Matthews	932	3	2.8	27	4.9	79	3.5	40	4.5	75	3.3	39	4.8	74	3.3	32	4.7	78
23	Merry Oaks	306	3	2.9	28	4.0	61	3.8	54	4.2	66	3.6	47	5.1	77	3.5	40	4.2	65
38	Midwood	280	3	3.6	46	4.1	64	3.8	53	4.2	66	4.0	58	4.7	72	3.7	51	4.2	67
41	Montclaire	382	3	2.4	17	3.9	58	3.3	29	3.9	56	3.2	34	4.5	69	3.0	23	3.9	58
39	Myers Park	575	3	4.4	70	5.7	89	4.3	68	4.8	84	4.5	68	5.9	83	4.4	71	5.4	89
45	Nations Ford	871	3	3.2	35	3.8	52	3.6	47	4.0	62	3.7	51	4.3	63	3.5	42	3.9	59
45	Newell	761	3	3.1	33	3.9	56	3.5	37	3.8	54	3.5	44	4.1	60	3.4	36	3.8	55
40	Oakdale	461	3	3.3	37	4.12	84	3.6	47	4.3	69	3.6	46	4.7	73	3.5	42	4.3	70
50	Oakhurst	468	3	2.8	25	3.9	56	3.5	39	4.0	69	3.1	33	3.7	51	3.3	31	3.8	56
35	Olde Providence	423	3	3.6	46	5.5	87	4.2	65	5.3	93	4.1	59	7.1	92	3.9	58	5.8	94
46	Park Road	274	3	3.3	37	5.3	84	3.8	53	4.8	84	4.1	58	6.7	90	3.6	47	5.4	89
41	Paw Creek	401	3	3.9	55	4.3	67	4.0	59	4.0	633	5.2	78	5.5	80	4.0	62	4.3	70
30	Pawtuckett	475	3	3.3	37	4.1	63	4.0	60	4.6	79	4.2	62	4.7	73	3.7	52	4.5	74
39	Pineville	861	3	3.3	37	4.5	71	3.6	45	4.4	70	3.7	50	5.3	78	3.5	42	4.5	75
51	Pinewood	434	3	3.3	38	4.3	67	3.9	55	4.5	75	3.6	47	5.0	76	3.6	46	4.6	76
38	Piney Grove	473	3	2.8	25	4.6	75	3.7	48	4.8	84	3.6	46	6.3	86	3.4	37	5.1	75
49	Plaza Road	352	3	3.0	31	3.5	44	3.7	48	4.1	64	3.8	55	4.3	63	3.5	40	3.9	57
29	Rama Road	476	3	3.1	32	5.3	84	3.7	49	5.0	87	3.5	44	6.9	91	3.5	40	5.4	90
45	Sedgefield	568	3	3.3	37	4.8	72	3.6	47	4.5	74	3.8	54	6.3	86	3.6	44	4.7	78
41	Selwyn	637	3	3.1	31	4.6	75	3.7	48	4.7	82	3.5	44	5.7	83	3.4	38	4.9	83
48	Shamrock Gardens	351	3	3.1	31	3.8	53	3.5	37	4.0	60	3.7	49	4.6	71	3.4	38	3.9	60
45	Sharon	632	3	2.9	29	5.4	88	3.7	48	5.2	88	3.5	44	6.6	89	3.4	38	5.4	89
38	Starmount	410	3	3.2	34	4.4	70	3.4	36	4.5	75	3.7	52	5.0	77	3.4	36	4.5	75
43	Statesville Road	777	3	3.0	31	3.2	34	3.6	44	3.8	48	3.6	46	3.5	44	3.5	30	3.5	40
36	Steele Creek	747	3	3.2	34	4.3	67	3.6	47	4.5	75	3.7	51	4.9	75	3.8	47	4.5	75
43	Thomasboro	609	3	3.4	40	3.8	52	4.2	65	4.4	70	3.9	55	3.9	56	3.8	54	3.9	60
41	Tryon Hills	378	3	2.8	26	3.0	30	3.4	36	3.6	45	3.1	33	3.3	37	3.2	30	3.4	36
42	Westerly Hills	516	3	.3	37	3.5	44	3.9	56	4.0	63	3.8	54	4.1	58	3.6	47	3.8	55
37	Windsor Park	535	3	2.5	20	4.0	62	3.3	29	4.0	63	2.9	29	4.5	60	3.0	24	4.1	63
37	Winterfield	531	3	3.4	41	4.7	76	3.9	65	4.7	81	4.0	58	6.0	84	3.7	50	4.9	83
43	Allenbrook	422	6	7.1	55	8.9	78	8.0	72	8.9	87	6.4	45	9.6	79	7.3	60	8.8	86
42	Ashley Park	347	6	6.6	34	7.5	60	6.7	49	7.7	67	6.2	43	8.5	70	6.2	41	7.8	64
23	Bain	834	6	5.2	29	8.5	74	5.7	34	8.5	82	5.4	36	10.3	84	5.7	34	8.5	82
37	Barringer	770	6	5.7	37	9.1	82	6.5	46	8.7	86	6.0	42	10.6	87	6.2	41	9.0	87
43	Berryhill	518	6	5.2	29	7.2	56	6.0	36	6.7	60	4.9	31	7.3	56	5.5	31	6.9	54
43	Billingsville	462	6	5.1	28	9.0	81	6.6	47	8.7	85	6.6	48	11.6	91	6.1	39	9.0	86
56	Briarwood	758	6	6.4	46	8.3	72	6.4	42	7.8	69	6.9	52	9.3	77	6.4	45	8.0	73
38	Bruns Avenue Center Ct.	678	6	4.8	25	8.3	73	5.7	31	8.0	75	4.7	28	[illegible]	80	5.3	27	8.1	77
44	[illegible]	[illegible]	6	5.5	34	7.8	63	6.3	42	7.9	70	5.5	40	8.8	73	5.8	37	7.9	70
17	Clear Creek	709	6	4.8	25	7.9	65	6.3	40	8.0	74	5.5	38	9.5	78	5.7	33	8.0	73
37	Collinswood	381	6	6.3	44	8.1	70	8.0	72	8.5	84	7.0	54	10.1	82	7.2	59	8.4	81
23	Cornelius	544	6	5.7	36	8.1	69	6.5	45	7.8	66	5.8	40	9.3	77	6.1	39	8.0	72
35	Cotswold	429	6	6.0	40	8.6	76	6.3	41	8.3	82	6.3	44	10.4	85	6.2	41	8.7	83
38	Davidson	253	6	5.2	29	8.3	73	6.2	39	8.6	85	5.0	33	10.6	87	5.7	33	8.9	85
37	Marie G. Davis	504	6	6.0	41	9.0	81	6.3	40	8.2	80	6.3	45	10.5	85	6.1	40	8.7	83
44	Derita	763	6	6.0	41	7.9	64	6.7	50	7.9	70	6.5	47	8.8	73	6.4	45	7.8	70

ATTACHMENT 10

43	Berryhill	518	6	5.2	29	7.2	56	6.0	36	6.7	50	4.9	31	7.3	56	5.5	31	6.9	54
43	Billingsville	462	6	5.1	28	9.0	81	6.6	47	8.7	86	6.6	46	11.6	91	6.1	30	[illegible]	86
56	Briarwood	758	6	6.4	46	8.3	72	6.4	42	7.3	80	6.9	52	9.3	77	6.4	46	8.0	75
38	Bruns Avenue Center City	678	6	4.9	25	8.3	73	5.7	31	6.9	75	4.7	29	8.6	80	6.5	27	8.1	77
44	Chantilly	406	6	5.6	34	7.8	63	6.3	42	7.8	70	5.8	40	8.8	73	5.2	37	7.9	70
17	Clear Creek	709	6	4.9	25	7.9	65	6.3	40	6.9	74	5.5	36	9.5	70	6.7	33	6.0	73
39	Collinswood	381	6	6.3	44	8.1	70	8.0	72	8.5	84	7.0	54	10.1	88	7.2	50	8.4	81
23	Cornelius	544	6	5.7	38	8.1	69	6.5	46	7.6	66	5.8	40	9.3	77	6.1	38	6.0	72
35	Cotswold	439	6	6.0	40	8.6	76	6.3	41	8.3	82	6.3	44	10.4	86	6.2	41	8.7	83
38	Davidson	253	6	6.2	29	8.3	73	6.2	[illegible]	6.6	86	5.8	33	10.6	87	6.7	33	6.9	86
37	Marie G. Davis	504	6	6.0	41	9.0	81	6.3	40	8.2	80	6.3	45	10.5	86	6.1	40	8.7	83
44	Derita	763	6	6.0	41	7.9	64	6.7	50	7.9	79	6.5	47	8.8	73	6.4	46	7.9	70
38	Dilworth	5[illegible]0	6	5.7	37	8.3	73	8.4	42	8.0	73	5.5	38	9.4	78	6.1	39	8.0	76
41	Double Oaks Now Closed	379	6	5.5	34	7.5	60	6.7	49	6.8	73	5.5	38	9.2	76	6.1	39	8.0	71
46	Druid Hills	475	6	5.2	29	8.3	72	5.9	33	7.7	86	5.3	36	9.6	80	6.6	31	8.0	72
24	Eastover	766	6	6.0	40	10.0	86	6.6	46	9.1	91	8.9	41	12.7	94	6.3	42	10.0	92
37	Elizabeth	489	6	6.8	51	10.2	89	6.7	51	8.5	84	7.7	60	12.5	93	6.9	54	9.6	90
46	Enderly Park	326	6	6.2	43	7.7	62	6.6	48	7.8	80	7.0	54	8.7	72	6.5	47	7.9	80
31	First Ward	651	6	4.9	25	9.0	80	6.2	40	6.9	87	4.9	31	10.9	88	5.5	31	9.0	87
22	J.H. Gunn	621	6	5.5	34	8.1	70	6.0	36	8.0	75	4.8	30	10.2	83	5.5	31	8.1	77
26	Hickory Grove	820	6	5.7	37	9.0	81	6.6	47	8.5	83	5.9	41	10.8	88	6.1	40	9.6	86
41	Hidden Valley	980	6	6.2	43	7.2	57	7.0	54	7.6	65	7.3	56	8.9	75	6.7	49	7.5	63
45	Highland	329	6	4.8	24	6.3	44	6.5	46	7.4	62	5.2	34	7.4	58	5.6	33	6.8	52
34	Huntersville	562	6	6.0	41	7.9	64	6.9	54	8.0	77	6.6	48	10.0	81	6.5	47	8.0	75
48	Amay James	370 [redacted]	6	5.7	37	8.5	74	6.7	50	8.5	84	6.6	48	10.7	87	6.3	42	8.7	84
44	Lincoln Heights Center City	611	6	5.6	34	8.4	73	6.6	48	8.3	82	5.8	38	10.1	82	6.0	38	8.4	81
40	Long Creek	682	6	8.0	65	8.0	67	8.1	79	8.0	78	8.4	66	9.2	78	8.0	74	8.0	74
23	Matthews	932	6	5.8	37	8.8	78	6.2	38	8.0	77	6.7	50	10.7	87	6.1	40	8.6	82
23	Merry Oaks	306	6	7.7	62	8.1	70	7.2	58	8.0	73	6.7	51	8.6	71	7.1	57	8.0	74
39	Myers Park Open Traditional	575	6	7.4	59	10.3	90	7.8	60	9.0	90	8.5	71	11.6	92	7.8	66	10.0	92
45	Nations Ford	871	6	6.4	45	8.0	68	7.3	56	8.2	80	6.9	53	10.0	81	6.8	52	8.2	78
45	Newell	761	6	6.6	48	8.0	68	6.7	49	8.0	73	7.1	54	9.6	80	6.7	50	8.0	75
50	Oakhurst	468	6	5.6	34	7.5	60	5.7	31	7.6	66	5.9	40	8.3	67	5.7	33	7.6	64
48	Oaklawn	409	6	6.4	45	8.0	67	7.7	67	8.6	84	6.8	52	10.1	82	7.0	55	8.4	80
37	Piedmont 6th grade only →	113	6	4.9	25	10.0	86	5.4	26	8.5	83	4.5	26	11.6	91	5.2	25	9.2	88
44	Plaza Road	349	6	5.5	33	7.4	59	5.6	30	6.7	50	4.6	27	6.8	51	5.4	29	6.8	52
45	Sedgefield	518	6	5.5	34	8.0	66	6.6	48	8.0	73	5.7	39	8.7	73	6.1	40	8.0	71
41	Selwyn	637	6	4.5	19	9.6	84	5.3	30	8.2	80	4.6	27	10.9	89	5.2	25	8.9	85
45	Sharon	632 [redacted]	6	6.5	47	9.9	85	6.7	51	8.8	86	6.8	51	11.9	92	6.7	49	9.7	90
43	Statesville Road	777	6	6.3	45	6.5	47	6.9	53	7.0	54	6.9	53	7.0	54	6.7	49	6.7	50
36	Steele Creek	747	6	6.1	41	9.5	84	7.0	56	8.7	85	7.2	5	11.0	88	6.7	50	9.0	86
34	Sterling	766	6	5.5	34	8.0	69	6.5	46	8.0	72	6.4	45	9.3	77	6.1	39	8.0	73
43	Thomasboro	609	6	6.0	40	6.2	43	7.8	69	8.0	72	7.1	35	7.8	61	6.9	54	7.2	58
41	Tryon Hills	378	6	5.5	33	8.4	73	6.3	40	8.5	84	5.6	39	10.1	82	5.8	35	8.7	84
38	Tuckaseegee	328	6	5.0	26	7.2	56	5.9	34	7.2	58	4.9	31	7.7	60	5.4	29	7.1	57
35	University Park	591	6	6.1	41	8.0	67	6.8	52	8.0	78	6.8	51	9.6	79	6.5	47	8.0	76
42	Westerly Hills	516	6	5.7	37	7.5	60	5.9	34	7.5	64	5.6	39	8.2	67	5.8	36	7.4	62
37	Windsor Park	535	6	4.5	19	8.0	68	5.6	30	7.9	70	4.2	21	9.0	75	4.9	22	8.0	71
34	Albemarle Road	970	9	8.0	33	11.8	72	9.0	44	12.5	73	8.2	37	12.6	73	8.6	38	12.1	73
31	Alexander	954	9	8.0	32	11.8	72	9.0	42	12.5	77	8.0	35	12.9	74	8.3	36	12.9	76
35	Carmel with [illegible]	1208	9	7.9	30	12.9	78	8.7	39	12.5	79	8.4	40	12.9	85	8.2	35	12.9	82
51	Cochrane	1014	9	8.2	35	11.2	67	9.1	45	11.9	68	9.2	46	12.9	77	8.8	41	11.7	71
38	Coulwood	604	9	✓8.6	39	10.7	62	10.0	52	12.6	73	10.0	52	12.4	72	(9.4)	48	11.4	70
38	Eastway	944	9	7.0	23	11.0	66	8.1	31	11.6	67	6.9	27	12.0	70	7.8	27	11.2	69
34 ✓	Alexander Graham with [illegible]	788	9	7.7	28	12.9	81	8.0	29	12.5	80	7.6	31	12.0	85	7.0	28	12.9	84
45	Hawthorne	693	9	7.5	27	9.9	51	8.3	34	9.8	50	7.7	32	10.2	54	8.0	30	9.8	51
46	Kennedy	634	9	8.0	32	11.1	67	9.5	49	12.5	69	9.6	49	12.9	76	9.0	43	11.8	72
21	McClintock	982	9	7.9	30	12.9	76	8.7	38	12.5	78	8.0	36	12.9	86	8.1	34	12.9	82
28	Northeast	1111	9	7.8	29	11.7	71	8.8	39	12.5	75	8.0	34	12.9	78	8.0	33	12.9	76
50	Northwest	501	9	7.3	25	10.3	58	8.5	36	10.4	59	7.8	33	11.6	67	6.0	30	10.5	60
30	Piedmont Jr. Open School	393	9	8.5	39	12.9	88	8.6	38	12.6	78	8.4	40	12.9	91	8.5	38	12.9	87
31	Quail Hollow	1098	9	7.7	28	12.9	78	8.8	39	12.6	78	7.5	30	12.9	78	8.0	33	12.9	80
29	Randolph	832	9	7.7	28	12.2	74	8.9	40	12.5	75	8.1	36	12.9	77	8.1	34	12.9	77
43	Ranson	679	9	8.0	33	10.5	[illegible]	9.4	48	11.1	63	10.0	52	11.6	68	9.0	44	10.9	64
37	Sedgefield	622	9	7.5	26	11.3	68	8.0	31	12.5	69	7.5	30	12.9	78	7.9	28	12.1	73
46	Smith	778	9	7.7	28	11.9	73	8.6	37	12.5	76	8.5	41	12.9	87	8.2	34	12.9	81
49	Spaugh	591	9	✓8.6	38	10.4	59	9.0	43	11.1	64	8.8	43	11.2	64	6.8	41	10.8	63
40	Williams	735	9	7.6	27	11.0	65	8.4	35	11.1	63	7.8	33	11.3	66	8.0	31	10.9	64
38	Wilson	815	9	7.0	22	10.6	61	8.5	36	10.9	61	7.4	30	11.6	57	7.9	28	10.8	63
			9	7.9	30	11.6	71	8.7	39	12.5	72	8.1	36	12.9	76	8.2	34	12.1	74

National Norms 3rd Grade = 3.7 — 6th grade = 6.7 — 9th grade = 9.7

77 7th Street Academy (JR. Hi) - 32 children

97 2nd TAPS (JR Hi) students 37 girls Teen Age Pregnancy School

Senator EAST. Unless I hear vigorous protest, we shall stand in recess. Thank you very much.

[Whereupon, at 3 p.m., the hearing was recessed, subject to the call of the Chair.]

APPENDIX

PROPOSED LEGISLATION

97TH CONGRESS
1ST SESSION

S. 528

To establish reasonable limits on the power of courts of the United States in the imposition of injunctive relief in suits to protect the constitutional rights of individuals in public education and to authorize the Attorney General to institute suits to enforce such limits.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 24 (legislative day, FEBRUARY 16), 1981

Mr. JOHNSTON (for himself, Mr. LAXALT, Mr. THURMOND, Mr. HOLLINGS, Mr. DECONCINI, Mr. EXON, and Mr. MCCLURE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To establish reasonable limits on the power of courts of the United States in the imposition of injunctive relief in suits to protect the constitutional rights of individuals in public education and to authorize the Attorney General to institute suits to enforce such limits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Neighborhood School Act of 1981".

STATEMENT OF FINDINGS AND PURPOSES

SEC. 2. (a) The Congress finds that—

(1) court orders requiring transportation of students to or attendance at public schools other than one closest to their residences for the purpose of achieving racial balance in public school systems have been an ineffective remedy and have not achieved unitary public school systems and that such orders frequently result in the exodus from public school systems of children which causes even higher racial imbalances and less support for public school systems;

(2) assignment and transportation of students to public schools other than to one closest to their residences is expensive and wasteful of scarce supplies of petroleum fuels;

(3) the pursuit of racial balance at any cost is without constitutional or social justification and that assignment of students to public schools or busing of students to achieve racial balance or to attempt to eliminate predominantly one race schools has been overused by courts of the United States and is in many instances educationally unsound and causes racial imbalances and separation of students by race to a greater degree that would have otherwise occurred;

(4) assignment of students to public schools closest to their residence (neighborhood public schools) is the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States.

(b) The Congress is hereby exercising its power to enforce, by appropriate legislation, the provisions of the fourteenth amendment.

LIMITATION OF INJUNCTIVE RELIEF

SEC. 3. Section 1651 of title 28, United States Code, is amended by adding the following new subsection (c):

"(c)(1) No court of the United States may order or issue any writ ordering directly or indirectly any student to be assigned or to be transported to a public school other than that which is nearest to the student's residence unless—

"(i) such assignment or transportation is provided incident to attendance at a 'magnet', vocational, technical, or other school of specialized or individualized instruction;

"(ii) such assignment or transportation is provided incident to a purpose directly and primarily related to an educational purpose;

"(iii) such assignment or transportation is provided incident to the voluntary attendance of a student at a school; or "(iv) the requirement of such transportation is reasonable.

"(2) The assignment or transportation of students shall not be reasonable and a court of the United States shall not issue any writ ordering the assignment or transportation of any student if—

"(i) there are reasonable alternatives available which involve less time in travel, distance, danger, or inconvenience;

"(ii) such assignment or transportation requires a student to cross a school district having the same grade level as that of the student;

"(iii) such transportation plan or order or part thereof is likely to result in a greater degree of racial imbalance in the public school system than was in existence on the date of the order for such assignment or transportation plan or is likely to have a net harmful effect on the quality of education in the public school district;

"(iv) the total actual daily time consumed in travel by schoolbus for any student exceeds by 30 minutes the actual daily time consumed in travel by schoolbus to and from the public school with a grade level indentical to that of the student and which is closest to the student's residence;

"(v) the total actual round trip distance traveled by schoolbus for any student exceeds by 10 miles the total actual round trip distance traveled by schoolbus to and from the public school closest to the student's residence and with a grade level identical to that of the student.".

SUITS BY THE ATTORNEY GENERAL

SEC. 4. Section 407(a) of title IV of the Civil Rights Act of 1964 (Public Law 88–352, section 407(a); 78 Stat. 241, section 407(a); 42 U.S.C. 2000c–6(a)), is amended by inserting after the last sentence the following new subparagraph:

"Whenever the Attorney General receives a complaint in writing signed by an individual, or his parent, to the effect that he has been required directly or indirectly to attend or to be transported to a public school in violation of the Neighborhood School Act and the Attorney General believes that the complaint is meritorious and certifies that the signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder."

II

97TH CONGRESS
1ST SESSION

S. 1005

To amend the Civil Rights Act of 1964 to provide for freedom of choice in student assignments in public schools.

IN THE SENATE OF THE UNITED STATES

APRIL 27, 1981

Mr. HELMS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Civil Rights Act of 1964 to provide for freedom of choice in student assignments in public schools.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Student Freedom of Choice Act".

SEC. 2. The Civil Rights Act of 1964 (42 U.S.C. 1971—1975a–1975d, 2000a–2000h–6) is amended by adding at the end thereof the following new title:

"TITLE XII—PUBLIC SCHOOL—FREEDOM OF CHOICE

"SEC. 1201. As used in this title—

"(a) 'State' means any State, district, Commonwealth, territory, or possession of the United States.

"(b) 'Public school' means any elementary or secondary educational institution, which is operated by a State, subdivision of a State, or governmental agency within a State, or any elementary or secondary educational institution which is operated, in whole or in part, from or through the use of governmental funds or property, or funds or property derived from a governmental source.

"(c) 'School board' means any agency which administers a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

"(d) 'Student' means any person required or permitted by State law to attend a public school for the purpose of receiving instruction.

"(e) 'Parent' means any parent, adoptive parent, guardian, or legal or actual custodian of a student.

"(f) 'Faculty' means the administrative and teaching force of a public school system or a public school.

"(g) 'Freedom of choice system' means a system for the assignment of students to public schools and within public schools maintained by a school board operating a system of public schools in which the public schools and the classes it operates are open to students of all races and in which the students are granted the freedom to attend public schools and classes chosen by their respective parents from among the public schools and classes available for the instruction of students of their ages and educational standings.

"SEC. 1202. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity at any public school by way of grant, loan, or otherwise shall withhold, or threaten to withhold, such financial assistance from any such program or activity on account of the racial composition of the student body at any public school or in any class at any public school in any case whatever where the school board operating such public school or class maintains, in respect to such public school and class, a freedom of choice system.

"SEC. 1203. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity at any public school by way of grant, loan, or otherwise shall withhold, or threaten to withhold, any such Federal financial assistance from any such program or activity at such public school to coerce or induce the school board operating such public school to transport students from such public school to any other public school for the purpose of altering in any way the racial composition of the student body at such public school or any other public school.

"SEC. 1204. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity of any public school in any public school system by way of grant, loan, or otherwise shall withhold or threaten to withhold any such Federal financial assistance from any such program or activity at such public school to coerce or induce any school board operating such public school system to close any public school, and transfer the students from it to another public school for the purpose of altering in any way the racial composition of the student body at any public school.

"SEC. 1205. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity at any public school in any public school system by way of grant, loan, or otherwise shall withhold or threaten to withhold any such Federal financial assistance from any such program or activity at such public school to coerce or induce the school board operating such public school system to transfer any member of any public school faculty from the public school in which the member of the faculty contracts to serve to some other public school for the purpose of altering the racial composition of the faculty at any public school.

"SEC. 1206. Whenever any department, agency, officer, or employee of the United States violates or threatens to violate section 1202, section 1203, section 1204, or section 1205 of this Act, the school board aggrieved by the violation or threatened violation, or the parent of any student affected or to be affected by the violation or threatened violation, or any student affected or to be affected by the violation or threatened violation, or any member of any faculty affected or to be affected by the violation or threatened violation may bring a civil action against the United States in a district court of the United States complaining of the violation or threatened violation. The district courts of the United States shall have jurisdiction to try and determine a civil action brought under this section irrespective of the amount in controversy and enter such judgment or issue such order as may be necessary or appropriate to redress the violation or prevent the threatened violation. Any civil action against the United States under this section may be brought in the judicial district in which the school board aggrieved by the violation or threatened violation has its principal office, or in the judicial district in which any school affected or to be affected by the violation or threatened violation is located, or in the judicial district in which a parent of a student affected or to be affected by the violation or threatened violation resides, or in the judicial district in which a student affected or to be affected by the violation or threatened violation resides, or in the judicial district in which a member of a faculty affected or to be affected by the violation or threatened violation resides, or in the judicial district encompassing the District of Columbia. The United States hereby expressly consents to be sued in any civil action authorized by this section, and expressly agrees that any judgment entered or order issued in any such civil action shall be binding on the United States and its offending department, agency, officer, or employee, subject to the right of the United States to secure an appellate review of the judgment or order by appeal or certiorari as is provided by law with respect to judgments or orders entered against the United States in other civil actions in which the United States is a defendant.

"SEC. 1207. No court of the United States shall have jurisdiction to make any decision, enter any judgment, or issue any order requiring any school board to make any change in the racial composition of the student body at any public school or in any class at any public school to which students are assigned in conformity with a freedom of choice system, or requiring any school board to transport any students from one public school to another public school or from one place to another place or from one school district to another school district in order to effect a change in the racial composition of the student body at any school or place or in any school district, or denying to any student the right or privilege of attending any public school or class at any public school chosen by the parent of such student in conformity with a freedom of choice system, or requiring any school board to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial composition of the student body at any public school, or precluding any school board from carrying into effect any provision of any contract between it and any member of the faculty of any public school it operates specifying the public school where the member of the faculty is to perform his or her duties under the contract.".

II

8

97TH CONGRESS
1ST SESSION

S. 1147

To secure the right of students entitled to equal protection of the laws to be free from purposeful discrimination and segregation and to be treated in a racially neutral manner with regard to their assignment to public schools providing free public education, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 8 (legislative day, APRIL 27), 1981

Mr. GORTON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To secure the right of students entitled to equal protection of the laws to be free from purposeful discrimination and segregation and to be treated in a racially neutral manner with regard to their assignment to public schools providing free public education, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Racially Neutral School Assignment Act".

FINDINGS

SEC. 2. (a) In order to secure the right of students to be free from purposeful segregation and discrimination in their assignments to public schools, the Congress, pursuant to the authority granted under section 5 of the fourteenth amendment of the Constitution, enacts the provisions of this Act.

(b) The Congress finds and declares that the assignment of students to public schools on the basis of their race or color—

(1) is not reasonably related nor necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful segregation because such segregation can be eliminated without student assignments based on race or color;

(2) causes significant educational, familial, and social dislocations without commensurate benefits;

(3) undermines community support for public education;

(4) is disruptive of social peace and racial harmony;

(5) has not produced an improved quality of public education;

(6) debilitates and disrupts the public educational system and wastes public resources;

(7) constitutes a serious interference with the private decisions of parents as to how their children will be educated;

(8) unreasonably burdens individuals who are not responsible for the wrongs which such assignments seek to remedy; and

(9) denies the right of racially neutral treatment in school assignments to which students are, or ought to be, entitled.

(c) In light of the other findings contained in this section, Congress concludes that racially conscious assignment of students to schools is not necessary to the enforcement of the right to be free from purposeful segregation and discrimination in school assignments. Congress accordingly determines that every student has the right to have his or her assignment to public school determined in a racially neutral manner.

DEFINITIONS

SEC. 3. As used in this Act—

(1) The term "public school" means a day or residential school which provides elementary or secondary education, as determined under State law, except that it does not include any education beyond grade twelve.

(2) The term "free public education" means education which is provided at public expense, under

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public supervision and direction, and without tuition charge, and which is provided as elementary or secondary school education in the applicable State, except that such term does not include any education beyond grade 12.

(3) The term "student" means any individual who has not attained eighteen years of age.

(4) The term "State" shall include each of the several States, the District of Columbia, any Commonwealth or Territory of the United States, and any agency, board, commission, county, city, township, parish, municipal corporation, school district, or other political subdivision thereof.

RIGHTS PROTECTED

SEC. 4. (a) No student shall be denied the right to be free from purposeful segregation and discrimination by school authorities in his or her assignment to a public school. In view of the finding in section 2(b) that racially conscious school assignments are not necessary or appropriate to the enforcement of that right, no student shall be denied the right to have his or her assignment to a public school determined in a racially neutral manner.

(b) No court, department, or agency of the United States or of any State shall order the implementation of any plan which would require, because of the race or color of any

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student, the assignment of that student to a public school which provides free public education other than the school closest to his or her place of residence which provides the appropriate grade level and type of education for the student.

JURISDICTION AND RELIEF

SEC. 5. (a) Any person aggrieved by a violation of this Act may bring a civil action in the appropriate district court of the United States for such equitable relief as may be appropriate.

(b) The Attorney General may bring an action for a declaratory judgment in any appropriate case in which the Attorney General determines that the rights of individuals aggrieved by a violation of this Act will be served by bringing such an action.

(c) The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

TECHNICAL AMENDMENTS

SEC. 6. (a) Section 203(b) of the Equal Educational Opportunities Act of 1974 is amended to read as follows:

"(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of de jure, purposeful segregation.".

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(b) Section 215(a) of such Act is amended by striking out "or next closest".

SAVINGS PROVISION

SEC. 7. The provisions of this Act shall supersede all other provisions of Federal law that are inconsistent with the provisions of this Act.

APPLICATION

SEC. 8. This Act shall apply with respect to any order of a court, department, or agency of the United States or of any State, whether issued before or after the enactment of this Act.

II

97TH CONGRESS
1ST SESSION

S. 1647

To insure equal protection of the laws as guaranteed by the fourteenth amendment to the Constitution of the United States and to deny the jurisdiction of the inferior Federal courts to order the assignment or transportation of students, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 21 (legislative day, SEPTEMBER 9), 1981

Mr. EAST introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To insure equal protection of the laws as guaranteed by the fourteenth amendment to the Constitution of the United States and to deny the jurisdiction of the inferior Federal courts to order the assignment or transportation of students, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Neighborhood School Transportation Relief Act of 1981".

STATEMENT OF FINDINGS AND PURPOSE

SEC. 2. (a) The Congress enacts the provisions of this Act pursuant to its authority under section 1 of article III of the Constitution of the United States and under section 5 of the fourteenth amendment to the Constitution of the United States.

(b) The Congress finds that the assignment and transportation of students to elementary and secondary public schools on the basis of race, color, or national origin—

(1) leads to greater separation of the races and ethnic groups by causing affected families to relocate their places of residence or disenroll their children from public schools;

(2) fails to account for the social science data indicating that racial and ethnic imbalance in the public elementary and secondary schools is often the result of economic and sociologic factors rather than past discrimination by public officials;

(3) is not reasonably related or necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful, segregation because such segregation can be eliminated without such assignment and transportation;

(4) causes significant educational, familial, and social dislocations without commensurate benefits;

(5) undermines community support for public education;

(6) is disruptive of social peace and racial harmony;

(7) has not produced an improved quality of education;

(8) debilitates and disrupts the public educational system and wastes public funds and other resources;

(9) unreasonably burdens individuals who are not responsible for the wrongs such assignment and transportation are purported to remedy;

(10) infringes the right to racially and ethnically neutral treatment in school assignment; and

(11) has been undertaken without any constitutional basis or authority since the Constitution of the United States does not require any right to a particular degree of racial or ethnic balance in the public schools.

(c) The Congress further finds that the enforcement of the right to be free from intentional desegregation and discrimination in school assignments can best be enforced by denying jurisdiction of the inferior Federal courts to order the assignment or transportation of students to public elementary and secondary schools on the basis of race, color, or national origin.

LIMITATION ON THE JURISDICTION OF INFERIOR FEDERAL COURTS WITH RESPECT TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS

SEC. 3. (a) Chapter 155 of title 28 of the United States Code (relating to the congressional power to limit the injunctive power of inferior Federal courts and relating to three-judge courts), is amended by adding before section 2283 the following new section:

"§ 2282. Jurisdiction; limitations

"(a) Notwithstanding any other provision of law, no inferior court of the United States nor any judge of any inferior court of the United States shall have jurisdiction to issue any injunction, writ, process, order, citation for or order with respect to contempt, rule, judgment, decree, or command—

"(1) requiring the assignment or transportation of any student to a public elementary or secondary school operated by a State or local educational agency for the purpose of altering the racial or ethnic composition of the student body at any public school;

"(2) requiring any State or local educational agency to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial or ethnic composition of the student body at any public school; or

"(3) precluding any State or local educational agency from fulfilling any provision of any contract between it and any member of the faculty or administration of any public school it operates specifying the public school where the member of the faculty or administration is to perform his or her duties under the contract.

"(b)(1) For the purpose of this section the term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

"(2) For the purpose of this section the term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.".

(b) The section analysis of chapter 155 of title 28 of the United States Code is amended by inserting before the item for section 2283 the following new item:

"§ 2282. Jurisdiction; limitations.".

II

97TH CONGRESS
1ST SESSION

S. 1743

To insure equal protection of the laws as guaranteed by the fourteenth amendment to the Constitution of the United States and to deny the jurisdiction of the inferior Federal courts to order the assignment or transportation of students, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 15 (legislative day, OCTOBER 14), 1981

Mr. HELMS introduced the following bill; which was read the first time

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A BILL

To insure equal protection of the laws as guaranteed by the fourteenth amendment to the Constitution of the United States and to deny the jurisdiction of the inferior Federal courts to order the assignment or transportation of students, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Neighborhood School Transportation Relief Act of 1981".

STATEMENT OF FINDINGS AND PURPOSE

SEC. 2. (a) The Congress enacts the provisions of this Act pursuant to its authority under section 1 of article III of the Constitution of the United States and under section 5 of the fourteenth amendment to the Constitution of the United States.

(b) The Congress finds that the assignment and transportation of students to elementary and secondary public schools on the basis of race, color, or national origin—

(1) leads to greater separation of the races and ethnic groups by causing affected families to relocate their places of residence or disenroll their children from public schools;

(2) fails to account for the social science data indicating that racial and ethnic imbalance in the public elementary and secondary schools is often the result of economic and sociologic factors rather than past discrimination by public officials;

(3) is not reasonably related or necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful, segregation because such segregation can be eliminated without such assignment and transportation;

(4) causes significant educational, familial, and social dislocations without commensurate benefits;

(5) undermines community support for public education;

(6) is disruptive of social peace and racial harmony;

(7) has not produced an improved quality of education;

(8) debilitates and disrupts the public educational system and wastes public funds and other resources;

(9) unreasonably burdens individuals who are not responsible for the wrongs such assignment and transportation are purported to remedy;

(10) infringes the right to racially and ethnically neutral treatment in school assignment; and

(11) has been undertaken without any constitutional basis or authority since the Constitution of the United States does not require any right to a particular degree of racial or ethnic balance in the public schools.

(c) The Congress further finds that the enforcement of the right to be free from intentional desegregation and discrimination in school assignments can best be enforced by denying jurisdiction of the inferior Federal courts to order the assignment or transportation of students to public elementary and secondary schools on the basis of race, color, or national origin.

LIMITATION ON THE JURISDICTION OF INFERIOR FEDERAL COURTS WITH RESPECT TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS

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"(1) requiring the assignment or transportation of any student to a public elementary or secondary school operated by a State or local educational agency for the purpose of altering the racial or ethnic composition of the student body at any public school;

"(2) requiring any State or local educational agency to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial or ethnic composition of the student body at any public school; or

"(3) precluding any State or local educational agency from fulfilling any provision of any contract between it and any member of the faculty or administration of any public school it operates specifying the public school where the member of the faculty or administration is to perform his or her duties under the contract.

"(b)(1) For the purpose of this section the term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

"(2) For the purpose of this section the term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.".

II

97TH CONGRESS
1ST SESSION

S. 1760

To provide for civil rights in public schools.

IN THE SENATE OF THE UNITED STATES

OCTOBER 21 (legislative day, OCTOBER 14), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for civil rights in public schools.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public School Civil Rights Act of 1981".

SEC. 2. The Congress finds that—

(1) the assignment of students to public schools on the basis of race, color, or national origin, or in order to achieve balance or correct imbalance regarding race, color, or national origin in public schools—

(A) violates constitutional and legal guarantees that individuals shall not be denied equal protection of the law;

(B) violates constitutional and legal guarantees that individual rights shall not be abridged on the basis of race, color, or national origin;

(C) has failed to demonstrate educational benefits commensurate with the disruption caused by such assignment;

(D) has failed to demonstrate social benefits commensurate with the disruption caused by such assignment;

(E) has contributed to a significant deterioration of public schools in the districts subject to such orders regarding assignment by inducing large numbers of families to migrate away from such districts;

(F) has contributed to the deterioration of public education by removing the neighborhood school as the focus of such education;

(G) has disrupted the education of countless schoolchildren who must endure lengthy transportation to and from school each day, and, as a result, must often forego participation in extracurricular activities occurring after school;

(H) has eroded community commitment to public schools and public education;

(I) interferes with the right of parents to make decisions regarding the education of their children;

(J) disrupts racial harmony by characterizing and classifying students on the basis of race or color and assigning them to schools on such basis;

(K) diverts significant amounts of financial resources away from direct improvement of the quality of education;

(L) usurps the responsibilities and traditional functions of State and local authorities to provide an educational system meeting the distinct needs of the community; and

(M) undermines public respect for the Government and its system of administering law and justice;

(2) past unconstitutional segregation, such as racial segregation enforced by law, is not a significant cause of existing racial imbalances in public schools,

(3) since assignment of students to public schools on the basis of race cannot be justified as a means of preventing or undoing racial discrimination by school authorities, such assignment is itself an unjustifiable

practice of racial discrimination by the Government in violation of the fourteenth amendment; and

(4) whatever the basic cause of racial imbalance in the public schools, assignment of students to public schools on the basis of race, color, or national origin results in more segregation of the races by inducing large numbers of nonminority families to migrate away from school systems subject to such assignment or by inducing large numbers of nonminority families to seek alternatives to public school education.

SEC. 3. (a) The Congress finds the remedies listed in subsection (b) are available for unconstitutional segregation exclusive of court orders which assign students to public schools on the basis of race, color, or national origin, finding that such orders themselves have the effect of excluding students from public schools on the basis of race, color, or national origin.

(b) The remedies which the Congress finds are available are—

(1) legal injunctions suspending all implementation of a segregative law or other racially discriminatory Government action;

(2) contempt of court proceedings where such injunctions are not scrupulously obeyed;

(3) programs without coercion or numerical quotas or specific goals based on racial balance that permit students to voluntarily transfer to other schools within the school district where they reside;

(4) advance planning in construction of new facilities to provide nondiscriminatory education within the students' neighborhood; and

(5) other local initiatives and plans to improve education for all students without regard to race, color, or national origin.

SEC. 4. The Congress, pursuant to its authority and powers granted under article III of the Constitution, and under section 5 of the fourteenth amendment to the Constitution, enacts the provisions of this Act in order to protect public school students against discrimination on the basis of race, color, or national origin.

SEC. 5. Section 1343 of title 28, United States Code, is amended by designating the current language as section (a) and adding at the end thereof the following:

"(b)(1) Notwithstanding any other provision of law, no inferior court established by Congress shall have jurisdiction to issue any order requiring the assignment or transportation of students to public elementary or secondary schools on the basis of race, color, or national origin or to issue any order which excludes any student from any public school on the basis of race, color, or national origin.

"(2) In the case of court orders entered prior to the date of this Act that require, directly or indirectly, the assignment or transportation of students to a public elementary or secondary school on the basis of race, color, or national origin or which excludes any student from any school on the basis of race, color, or national origin, any individual or school board or other school authority subject to such an order shall be entitled to seek relief from such order in any court and unless that court can make conclusive findings based on clear and convincing evidence that—

"(1) the acts that gave rise to the existing court order intentionally and specifically caused, and in the absence of the order would continue intentionally and specifically to cause, students to be assigned to or excluded from public schools on the basis of race, color, or national origin; for purposes of this finding, these 'acts that gave rise to the existing court order and intentionally and specifically caused, and in the absence of the order would continue intentionally and specifically to cause, students to be assigned to or excluded from public schools on the basis of race, color, or national origin' (including but not limited to school district reorganization, school boundary line changes, school construction, and school closings) shall not include legitimate efforts to employ public education resources to meet public education needs without regard to race, creed, or national origin,

"(2) the totality of circumstances have not changed since issuance of the order to warrant reconsideration of the order,

"(3) no other remedy, including those mentioned herein, would preclude the intentional and specific segregation,

"(4) the economic, social, and educational benefits of the order have outweighed the economic, social, and educational costs of the order,

then such plaintiffs shall be entitled to relief which is consistent with the provisions of this subsection and the Public School Civil Rights Act of 1981 from such order.".

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LC 2701 A

Recent Trends in School Integration[1]

JAMES S. COLEMAN
University of Chicago

In the past ten years, school desegregation has been a major policy issue in education, perhaps the major policy issue. At times, particularly during the period from about 1967 to 1971, it has become a major national issue, but even when no new policies are being initiated or contested at the federal level, the issue remains strong, or suddenly becomes strong, in particular localities. At present, for example, Boston is in the throes of implementing school desegregation between Roxbury and South Boston, Detroit is preparing to implement a city-wide integration plan, Louisville, Kentucky, is preparing integration between the city and the surrounding Jefferson County system; and many systems are operating under court orders.

But although school integration as a social policy has frequently been at the center of national attention, there has been much less attention to the actual state of school integration. In particular, there are two major processes going on which lead in opposing directions. One is a result of collective actions, taken by governmental bodies including school boards, legislatures, courts, and Federal administrative agencies. These actions are policies that aim to racially desegregate schools, and they constitute a process that increases contact among majority white children and various racial and ethnic minority children, particularly black children. The second process is a result of individual actions by these same Americans who assent to governmental policies that bring about integration—but these individual actions *reduce* contact between majority white children and minority children. The principal such action, an action of white parents, is moving from a school district in which the contact between blacks and whites is great to a school district in which it is small—usually from a city system where there is a high proportion of minority children to a suburban system in which there is a low proportion. A second action, taken by a smaller proportion of parents, is the use of private schools. For example, in Washington, D.C., the public school population is 95% black and only 3% white; but these precentages do not reflect the school-age population, for many white children (along with some black children) are in private schools.

These two processes, the collective and the individual, have both been proceeding apace, and it is not at all clear at present what the result will be. Will there be, ten years hence, greater majority-minority contact in the schools, or less than at present?

We cannot, of course, answer that question, for it depends on many unknown future events. But due to an unusually well-planned and consistent activity of the Office of Civil Rights of the Department of Health, Education, and Welfare, statistics on school segregation have been gathered from school districts covering almost all children in the country in the fall of 1968, 1970, and 1972. And in the odd years, 1969, 1971, and 1973, comparable statistics have been collected on a sample of schools. Thus for the four-year period 1968-72, and in some comparisons, for the five-year

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period 1968-73, it is possible to learn a great deal about the racial composition of schools, and how that composition has changed over this period.

Unfortunately, however, the Federal government, which collected these data, has not seen it useful to make provision to properly analyze them. For its economic policies, the government has learned, some years ago, that there are various indirect consequences of economic policy, and thus that it is important not only to gather data, but to subject them to standard, and relatively sophisticated, statistical treatment, on a routine basis. It knows, for example, that when the price of a good goes up (for example, gasoline through imposition of a tax), demand will go down, and furthermore, it has learned to use a standard statistical expression for this—the relation between the percentage increase in price and the percentage decrease in demand, or what economists call the price elasticity of demand. The stage is thus set for appropriate measurement; and when a new policy is debated, such as a tax on gasoline, there is enough evidence at hand, from government-initiated analyses, to provide some educated guesses about the likely effect of a tax of a given size on consumption of gasoline.

But the level of government sophistication in policy-making has not yet reached the stage where questions of that sort are automatically asked for non-economic policies. No one asks about the effect of a given percentage decrease in racial segregation within a district on the percentage increase in racial segregation between districts. Yet such questions are important if government policy in these non-economic areas is to be informed by knowledge of its expected effects.

This paper, then, has a second purpose beyond its primary one of showing what has happened in school integration in recent years. That second purpose is through demonstration to encourage, or goad, or shame the Federal government (if governments have the capacity for shame) into routinely carrying out statistical analyses which can inform non-economic policies about their indirect effects.[2]

I will proceed first by describing the state of integration among schools in the U.S. in 1968, and then examining changes since that time. To reduce the task to a manageable one within the confines of this paper, I will discuss only black-white segregation, neglecting several other aspects which may be analyzed from these data, and which will be discussed elsewhere. These are 1) minority groups other than blacks; 2) interracial school contact of students and teachers; 3) variations in segregation at different school levels, i.e., in elementary and secondary schools.

Racial segregation in 1968

The most meaningful measure of segregation or integration between different groups is a measure expressible in terms of the experience of members of these groups. Such a measure will be used here. It is (using the experience of black children with white children as an example for exposition) the proportion of the average black child's

Table 1. BLACK-WHITE SCHOOL SEGREGATION IN 1968 BY REGION

	Proportion white	White schoolmates of blacks	Proportion black	Black schoolmates of whites	Segregation Black-White		
					Total	Within system	Proportion within system
U.S.	.79	.22	.15	.04	.72	.63	.87
New England	.93	.49	.05	.03	.47	.34	.72
Middle Atlantic	.81	.31	.14	.05	.62	.43	.70
Border	.79	.26	.21	.07	.67	.48	.72
Southeast	.69	.16	.29	.07	.77	.75	.98
West South Central	.78	.18	.16	.04	.77	.69	.90
East North Central	.87	.29	.12	.04	.67	.58	.87
West North Central	.90	.27	.09	.03	.70	.61	.87
Mountain	.81	.36	.03	.01	.56	.49	.88
Pacific	.78	.25	.07	.02	.68	.56	.82
Outlying	.87	.83	.03	.03	.05	(-).04	—

schoolmates that are white. This is a weighted average of the proportion of white children in each school—weighted by the number of blacks in the school.[3] Such a measure can be provided for the average child of each group, with regard to each other group. Thus we can ask also about the proportion of blacks in the school attended by the average white child—or the proportion of black children in schools attended by the average Spanish-surname child.[4] The measure has its defects, in that there may be no "average black child" who has precisely the indicated proportion of whites in his school. In this it is like saying "the average American couple has 2.1 children." But having said this, and regarding it as a minor defect, I will proceed.[5]

This measure is directly a measure of the school contact of one group with another. For example, for the United States as a whole in 1968, the average black had in his school 74% blacks, 22% majority whites, and 4% other minorities. The average white had 4% blacks in his school, 93% majority whites, and 3% minorities other than blacks.

In addition to such measures, however, which show the school contact, it is useful to have another, which standardizes this measure of contact with children of a given group for the number of children in that group. If a school system has only a small proportion of white children, then the proportion of a black child's schoolmates that are white will be low even if there is no segregation within the system. A standardized measure of contact of black children with white may be obtained by dividing the measure of contact by the proportion of whites in the system. The standardized measure may be thought of as follows: If we think of the unstandardized measure as the probability that a black child's contact will be with a white, then the standardized measure is a conditional probability: the probability that his contact will be with a white given the proportion of whites in the system; or the probability of contact with a white per white child in the system.

Table 2. BLACK-WHITE SCHOOL SEGREGATION IN 1968 BY DISTRICT SIZE*

	Proportion white	White schoolmates of blacks	Proportion black	Black schoolmates of whites	Segregation within system
U.S.	.79	.22	.15	.07	.63
(in thousands) 100+	.52	.12	.38	.09	.71
25-100	.73	.22	.20	.06	.66
10-25	.83	.30	.11	.04	.54
5-10	.86	.28	.11	.04	.59
2.5-5	.88	.30	.09	.03	.56
under 2.5	.90	.35	.06	.02	.44

*The size classification for districts was carried out only once, for comparability across years. Sizes are based on 1972 enrollments.

If there is no segregation among schools, so that the proportion of the average black child's schoolmates that are white equals the proportion of whites in the system, the standardized measure of contact is 1; if there is complete segregation, it is 0. If we consider the U.S. as a single system, then starting with the fact that the proportion of whites in public schools in the U.S. in 1968 was .79, the standardized contact is .22/.79 = .28. For convenience, in order to have a measure of segregation, we will subtract this from 1, giving in this case a measure of segregation of .72 in 1968 for the U.S. considered as a single system.

When there are only two groups for which measures are calculated, both of the standardized measures, blacks with whites and whites with blacks, give the same number: the degree of underrepresentation of whites in schools attended by blacks is the same as the blacks' overrepresentation in schools attended by blacks, and underrepresentation of blacks in schools attended by whites. For the U.S. in 1968, the two black-white measures are .72.

In addition to a measure for school segregation for the U.S. considered as a whole, another measure more directly relevant to recent policy, may be calculated for the U.S. This is the average segregation (expressed, as before, as the underrepresentation of whites in schools attended by the average black) between schools within a system. That is, part of the overall segregation of blacks and whites in U.S. schools results from the fact that they live in different school districts, while part results from the fact that they attend different schools in the same district. The measure just discussed, .72, includes both of these types of segregation, while the average segregation measure over all districts in the U.S. (weighted by the number of blacks in the district) includes only the second. For 1968, for the U.S. as a whole, this is .63.[6] Thus in 1968, we can say that .63/.72 or 87% of the total school segregation is between schools in the same district, while the remainder is between schools in different districts, due to the differing racial composition of different districts.

The tabulations to be presented will contain seven numbers: 1) the overall proportion of whites; 2) the proportion of whites in the average black child's school; 3) the overall proportion of blacks; 4) the proportion of blacks in the average white's school; 5) the degree of segregation at the given level considered as a single system (the U.S. in this case), calculated from numbers (1) and (2); 6) the degree of within-district segregation; and 7) the proportion of the total segregation that is within districts, that is, column 6 divided by column 5.

Table 1 shows these numbers for the U.S. as a whole and for the regions of the U.S. designated by

Table 3. AVERAGE WITHIN-DISTRICT SEGREGATION IN 1968 IN EACH REGION ACCORDING TO DISTRICT SIZE

	U.S.	New England	Middle Atlantic	Border	South-east	West South Central	East North Central	West North Central	Mountain	Pacific	Outlying
>100	.71	—	.53	.59	.84	.79	.79	.82	—	.84	—
25-100	.66	.48	.54	.46	.77	.74	.61	.64	.56	.45	.10
10-25	.54	.28	.30	.23	.69	.61	.33	.22	.44	.35	-.23
5-10	.59	.08	.15	.24	.74	.64	.18	.15	.45	.20	.08
2.5-5	.56	.06	.08	.13	.74	.52	.09	.19	.11	.08	.01
<2.5 (in thousands)	.44	.01	.04	.04	.70	.36	.02	.09	.05	.05	-.13

the U.S. Census. Two regions have been split: In the Southeast, Border states have been separated from the remainder of the Southeast, since their patterns of integration following the 1954 ruling have differed sharply from the latter. And Hawaii and Alaska have been split off from the Pacific region, since both have very different racial mixtures, in which blacks are few, but children of other racial groups are numerous.

Table 1 shows, in columns 1 and 2, that in the U.S. as a whole in 1968, and in nearly all the regions, the proportion of whites in the average black's school is far below the population proportion of whites, and columns 3 and 4 show a similar result for blacks in the average white's school. Only in the Outlying states do the proportions approach or equal the population proportions; otherwise, only in New England is it above half the population proportion. In no region except the Outlying states does the average black have a majority of his schoolmates white. The closest he comes is in New England, at 49%, while the farthest is the Southeast where 16% of his schoolmates are white. In most of the regions, about a quarter of the average black child's schoolmates are white. On the other side, in no region are as many as 10% of an average white child's schoolmates black. It is useful to note that despite the high amount of segregation in the Southeast (see columns 5 and 6), the average white child in that region has (together with the Border region) the highest proportion of blacks in his school, .07. In fact, it is useful to speculate that the force of segregating processes among whites as individuals in an area varies with the proportion black in the area in such a way that the proportion black in the white child's classroom becomes relatively independent of the proportion black in the district. The similarity of numbers in column 4 across all regions, in contrast to the wide variations in columns 1, 2, and 3, suggests that this may well be the case.

Column 5 in Table 1 shows the overall segregation in the U.S. and in each region. As one might expect, that segregation is greatest in the two southern regions and in contiguous U.S., least in New England. Column 6 shows that within nearly all regions the within-district segregation is high as well, being especially high in the two Southern regions.[7] And column 7 shows that in nearly all regions, the large proportion of total segregation is between schools in the same system. This means that in no region in this country is the overall segregation in the region primarily due to differing distributions of blacks and whites in differing localities in the region. In all, it is primarily due to attending different schools in the same district. The proportion of segregation that is within district is smallest in the Middle Atlantic, Border, and New England states where the proportion of blacks differs considerably among different districts, and least in the Southeast, where blacks are more evenly distributed among districts.

A second way of examining segregation in 1968 is by size of district. Just as, for historical reasons, region is an important determinant of segregation, district size is important for ecological reasons: the number of schools encompassed, and the fact that it usually reflects city size, which in turn reflects the density of population and the geographical distribution of racial groups. Table 2 shows data directly comparable to those of columns 1-4 and 6 of Table 1, but for six size classes of districts (districts were grouped into size classes by 1972 district size, and kept in the same classes throughout for comparability). The data show several important variations by district size. First, columns 1 and 3 show that the proportion white increases sharply as district size decreases, while the proportion black decreases comparably. Column 2, showing the proportion of white schoolmates for the average black, indicates that this proportion is much greater in the smallest districts than it is in the largest ones. Some increase is of course to be expected with decrease in the district size, because of the increase in proportion white. Column 4, however, shows that there is much less variation in the schoolmate composition of the average white than in the schoolmate composition of the average black, again suggesting that the force of segregating processes adjusts to make the white child's school composition independent of the proportion of blacks in the area.

Column 5 shows that the within-district segregation shows a greater decline with smaller size districts. That is, the smaller the district, the lesser the degree of segregation within that district in 1968. Thus not all the increase in white schoolmates of blacks shown in column 2 is due to the greater proportion of whites; part is due to the smaller degree of segregation.

A useful further perspective on the locus of segregation in 1968 can be seen by examining the within-district segregation in each of these size classes in each region separately. This is shown in Table 3. What is remarkable about these figures is the very sharp reduction in segregation from large districts to small, in all regions except the Southeast, and to a lesser extent West South Central. Among the largest districts, the segregation is very high, and almost uniformly so across nearly all regions, with the Southern regions indistinguishable from the others. In the small districts, the segregation declines to near zero except in the two Southern regions. If we ask why the Southeast shows no decline in school segregation with decreasing district size, the most obvious difference is the fact that the proportion of blacks is high in small districts in the South, while it is not elsewhere. Again there is a suggestion that the force of the segregating processes in an area (whether by de jure segregation, manipulation of school attendance zones, or individual movement of residence) is such as to make the proportion of blacks in a white child's school independent of the proportion of blacks in the area. In the Southeast, the proportion of blacks in the average white child's school is remarkably constant from large to small size districts: .04, .06, .08, .07, .08, .08 (data not shown in Table 3).

Examining Table 3 further, it is interesting to note that the Border states are no different from those of Northern regions, except that they tend to show *less* segregation in the two largest size classes than do districts in nearly all the Northern regions.

There are other aspects of school segregation in 1968 that could be examined, but we shall not do so here in order to turn to the changes that occurred over the four year period 1968-72.

Trends in segregation 1968-72

To facilitate comparisons, graphs showing the movement from 1968 to 1972 will be used wherever possible. Figure 1 shows the total segregation (comparable to column 5 in Table 1) among schools in the U.S. as a whole and in each of the regions separately, for 1968, 1970, and 1972. Total segregation among schools in the U.S. has dropped sharply over this period, from .72 in 1968 to .56 in 1972. However, this drop obscures a great amont of variability in the degree of segregation in different regions. Excluding the Outlying states, where black-white segregation did not exist in 1968, only three regions showed drops comparable to or greater than that reflected in the U.S. total. The greatest (and also the greatest contributor to the total, because it contains the greatest number of blacks) was the Southeast, which dropped from highest to lowest in total segregation. The West South Central region showed a smaller, but still considerable, decline in segregation. And the Mountain states, with only a small number of blacks, also showed a considerable decline in segregation.

But some regions showed either no decline at all, or an increase in segregation over this period. The New England region increased slightly, the Middle Atlantic region increased slightly, and East North Central remained just where it had been. Thus it could be said that while the South was engaged in rapid desegregation over these years through government action, the North was engaged in slow segregation through individual action.

These are measures of *total* segregation in each region, including both the segregation among schools within the same district and the segregation due to the differing proportions of blacks in different districts. Figure 2 shows the within-district segregation in each of these regions. Nearly all changes in within-district segregation are due to some kind of local, state, or federal governmental action toward desegregation, while changes in total segregation in the region include also the individual movements toward segregation. Thus the changes in within-district segregation show approximately the strength of governmental policies in each region, while the changes in

Table 4. AVERAGE WITHIN-DISTRICT SEGREGATION IN 1972 IN EACH REGION ACCORDING TO DISTRICT SIZE

	U.S.	New England	Middle Atlantic	Border	Southeast	West South Central	East North Central	West North Central	Mountain	Pacific	Outlying
> 100	.65	—	.55	.55	.44	.76	.79	.84	—	.78	—
25-100	.39	.56	.53	.43	.28	.47	.60	.59	.25	.25	.07
10-25	.22	.20	.22	.17	.16	.31	.38	.20	.29	.16	-.62
5-10	.14	.08	.12	.06	.13	.17	.17	.19	.28	.05	.06
2.5-5	.09	.02	.05	.03	.09	.14	.07	.11	.09	.16	-.04
< 2.5	.03	0	.03	.02	.04	.02	.02	.01	.03	.05	-.05

(in thousands)

Table 5. CHANGES 1968-1972 IN WITHIN-DISTRICT SEGREGATION AND TOTAL SEGREGATION IN EACH REGION

	Within-district	Total
New England	—.01	+.02
Middle Atlantic	0	+.02
Border	—.04	—.02
Southeast	—.56	—.42
West South Central	—.21	—.14
East North Central	—.01	0
West North Central	—.05	—.04
Mountain	—.24	—.21
Pacific	—.14	—.07

total segregation show the net result of the governmental actions and the individual ones. Figure 2 shows that there are, in all regions but Middle Atlantic, declines in within-district segregation, but that the declines are negligible in New England and East North Central, and small in Border states. It shows also that the within-district segregation differs much more among the non-Southern districts than does the overall segregation. As Figure 1 showed, among the non-Southern districts other than Mountain and New England regions, each of which have few blacks, there is a close grouping between values of .6 and .7, throughout the six year period, while the within-district segregation among these same regions ranges from .42 to .61. This again suggests a homeostatic process, in which the individual segregating actions, increasing segregation across district boundaries, increase if the within-district segregation is low.

Another difference between Figures 1 and 2 is that total reduction in segregation (Figure 1) is in every case less than within-district reduction (Figure 2) Thus the within-district reductions, due to local, state, and federal policies, are partly countered by racial segregation between districts, which damp out the changes. The decline in within-district segregation and total segregation in each region over this six year period is given in Table 4. As the table shows, the total segregation declines less than the within-district segregation in every region, except in New England and Middle Atlantic, where it actually increases. That is, in every region, the decline in within-district segregation is partly offset by a decrease in the numbers of blacks and whites attending schools in the same district—due primarily to movement of whites into districts with smaller proportions of blacks than those they move from. Further, this difference between decline in within-district segregation and total segregation is greatest in those three of the four regions where there has been greatest desegregation of schools within districts: first the Southeast, and then the West South Central and Pacific regions. This gives an initial indicator of the size of the segregating individual responses (primarily on the part of whites) to an integrating action of their government. It does not, however, yet show this in any conclusive way: for that, it is necessary to examine the reduction in number of whites in a district as a function of the changes in segregation in that district. We shall return to this question subsequently.

For the present, we may learn more about desegregation policies and their results by examining changes in within-district segregation in each of the district size classes examined earlier. In this case, it is not meaningful to examine total segregation, because these size classes do not represent a geographic area, but each includes a subset of the districts in the U.S. as a whole. We can, however, ask how the average segregation in districts of each size class has changed over this period. The changes are shown in Figure 3.

The differences between the different size classes are striking. Although in 1968 the degree of segregation was not greatly different for the different size classes, with the smaller districts somewhat less segregated than the larger ones, the differences in change by size of districts are dramatic. Segregation in the largest districts, highest in 1968, showed only a very small change, while the smaller districts, already less segregated than the larger ones, showed a very great reduction in segregation. In general, the smaller the district, the greater the reduction in segregation. Thus policies of reducing school segregation within districts were enormously effective in small districts (neglecting for the present the segregating responses that show up in total segregation), almost wholly ineffective in the largest districts, and somewhat effective in districts from 25,000-100,000 in size.

However, these results somewhat obscure the different processes operating in different regions, for during this period federal and court policies were concentrated on the South. Thus it is useful to examine the changes in segregation in each of the size classes in each of the regions. To simplify exposition, we will list, in Table 5, the degree of segregation in 1972 in each size class in each region. This table can be directly compared with Table 3, which shows comparable figures for 1968.

Table 5 shows that the major changes have occurred in the two regions which in 1968 stood out from the others—the Southeast and the West South Central. The result is that in most size classes, the Southeast is among the least segregated regions, and the West South Central is not distinguishable from several Northern regions.

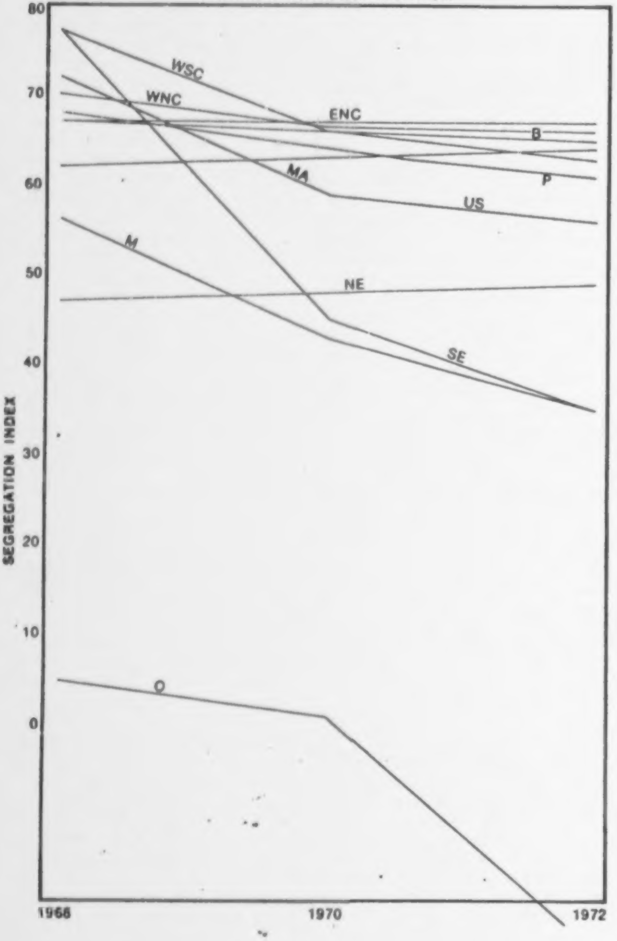
As Table 5 in comparison with Table 3 shows, there has been a great reduction in segregation in the largest districts in one region only, the Southeast. In 1968, its segregation in the largest districts was very high, along with those in most other regions. But while segregation in those regions has increased (2 regions), remained the same (1 region), or slightly declined

(3 regions), segregation in this region has declined sharply, from .84 to .44. Thus the absence of reduction in the largest districts, as shown in Figure 3, does not hold uniformly across regions. It is true for all regions except the Southeast, where it decreased along with all the other size classes in that region. Even in that region, however, the decrease in segregation in the largest districts is less than in smaller districts—or more generally, the smaller the district, the greater the decrease in segregation—just as shown for the U.S. as a whole in Figure 3.

The size of individual segregation responses to desegregation

One of the most important questions in understanding the changes in overall segregation in this country is the individual response, on the part of whites, to changes in the racial composition of their children's schools. The response takes several forms; the one we can identify with the present data is leaving the district.

FIGURE 1. TOTAL SEGREGATION



The various segregating responses on the part of whites, such as moving to a new district in which there are fewer blacks or in which the schools are more segregated, take place slowly, so that it is not possible to determine the ultimate magnitude of these responses. They also occur differentially according to affluence. Boston illustrates this well. The middle class whites in the Boston metropolitan area find it easy to move to a predominantly middle class, predominantly white suburb, while the working class whites cannot so easily afford to move.

Despite the fact that we cannot show the ultimate response of whites to desegregation within their district, we can show the response over the period 1968-72 in certain districts. The only statistics I can report at present, since the analysis of these data is still underway, concerns the twenty largest central city districts in the United States, and the next 50 largest central city districts.

First of all, it is clear that there is a general movement of whites, especially middle class whites, to the suburbs, a movement which predated school desegregation. Thus it is necessary to ask whether there is any movement due to school desegregation in that district over and above the general movement. It is also possible that the rate of white movement out of a city depends on the proportion of blacks in the city, quite apart from desegregation—that is, the higher the proportion of blacks, the higher the proportion of whites who will leave. Further, it is possible that mere size itself increases the proportion of whites who will leave.

Consequently, for the 20 largest city districts,[8] we can ask four questions:

1. What is the expected proportion of whites in the city who would leave between 1970 and 72 if there were no black children in city schools in 1970?

2. What is the increase in the expected proportion of whites in the city who would leave in 2 years if the city schools were 50% black instead of 0% in 1970?

3. What is the increase in the expected proportion of whites in the city who would leave if integration increased to the extent of an increase in 5% of blacks in the average white child's school? (In only one of these large cities, Atlanta, was the decrease greater than 5% in the period 1968-70, but in two others, Memphis and Houston, it was 4%.)

4. What greater proportion of whites would be expected to leave if a city were twice as large as another?

Note that these questions are free from the possible contamination of reverse effects because they examine the decline in white population in these cities in the two years 1970-72, as a function of the increase in proportion of black schoolmates of the average white in the two preceding years, 1968-70, and the proportion black in 1970. The answers to these questions for the 20 largest central city districts, with the rates of movement for a 2 year period, are:[9]

1. Proportion of whites who would leave in 2 years if there were no blacks (1970) and no increase in black schoolmates: 2%.

2. Additional proportion of whites who would leave in 2 years if there were 50% blacks (1970): 7%.

3. Additional proportion of whites who would leave in 2 years if increase in black schoolmates of the average white were 5% in preceding 2 years: 10%.

4. For a city twice as large as another, there are 1% fewer of whites leaving.[a]

For a city 50% black in 1970, with a 5% increase in black schoolmates of whites, the migration in 2 years is 19%, 2% + 7% + 10%. Thus from these preliminary results, it appears that the impact of desegregation, in these large cities, on whites' moving out of the central city is great. The governmental actions, reducing segregation within districts, provokes rather strong individual actions which partly offset that effect. Furthermore, although these data cannot show it, it is likely that the white exodus consists disproportionately of middle class families, leaving the integration among blacks and working class whites. Insofar as one intended consequence of integration is an increase in achievement of black children, the intent is largely defeated.

It is still the case, in all the metropolitan areas in which the central city's segregation decreased dramatically, that the overall segregation decreased as well. In the Atlanta SMSA, for example, where the largest proportion of whites left, the segregation of the district nevertheless went down 10%, from .85 to .75, although nothing like the 37% in Atlanta itself, or the 23% average of the districts in the metropolitan area. Yet the overall segregation is what is important in its social consequences, and a "slippage" from .37

FIGURE 2. AVERAGE WITHIN-DISTRICT SEGREGATION

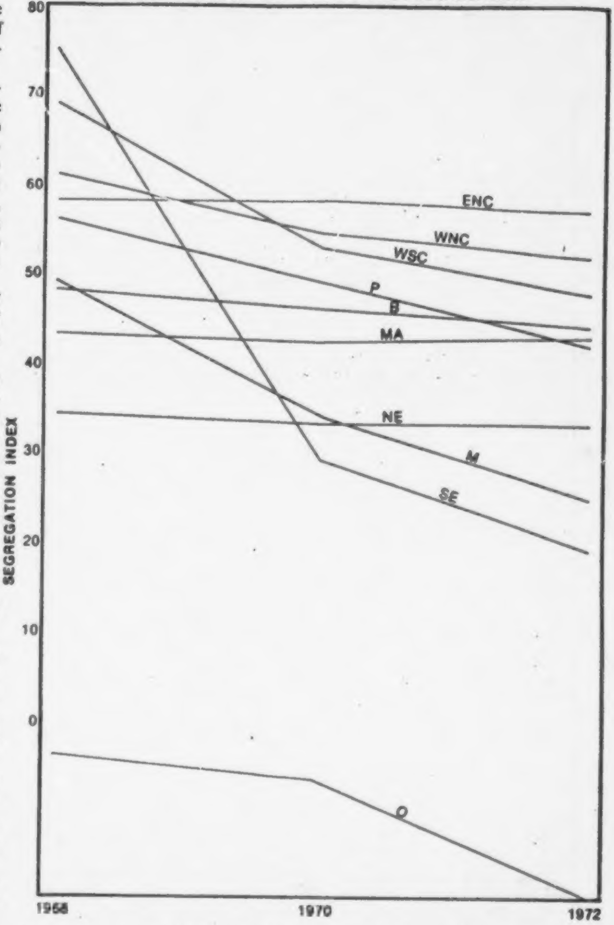
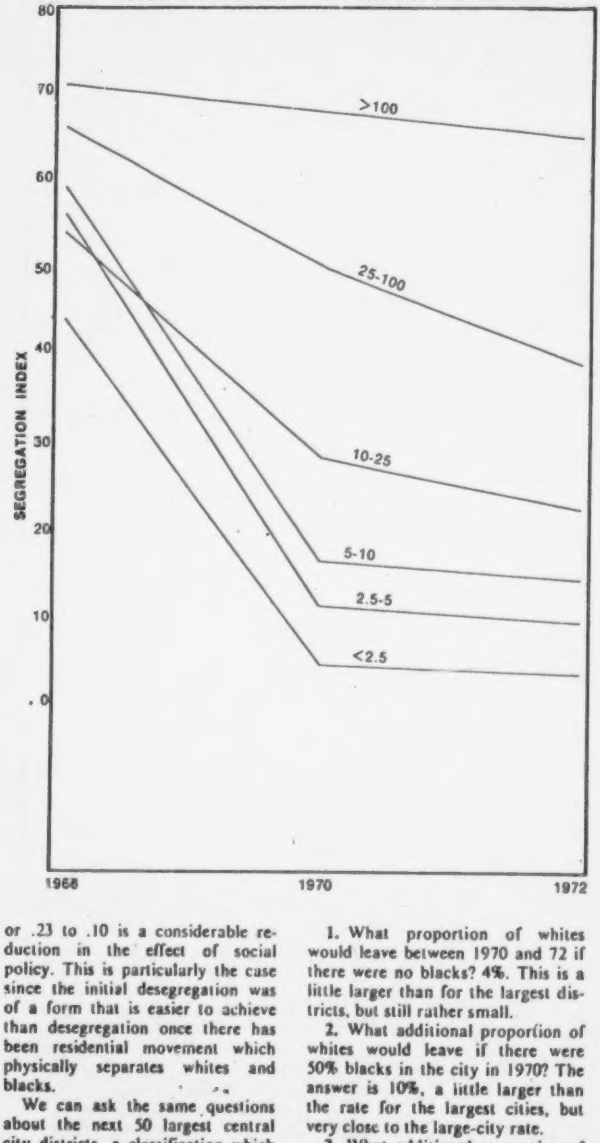


FIGURE 3. AVERAGE WITHIN-DISTRICT SEGREGATION



or .23 to .10 is a considerable reduction in the effect of social policy. This is particularly the case since the initial desegregation was of a form that is easier to achieve than desegregation once there has been residential movement which physically separates whites and blacks.

We can ask the same questions about the next 50 largest central city districts, a classification which includes most of the next 50 largest cities in the U.S.

1. What proportion of whites would leave between 1970 and 72 if there were no blacks? 4%. This is a little larger than for the largest districts, but still rather small.

2. What additional proportion of whites would leave if there were 50% blacks in the city in 1970? The answer is 10%, a little larger than the rate for the largest cities, but very close to the large-city rate.

3. What additional proportion of whites would leave if there were an increase in 1968-70 of 5% blacks in the average white's school? The answer is 1% fewer whites would leave.[a]

4. What additional proportion of whites would leave if the city were twice as large? The answer is 7% more.

Thus the picture is considerably different in these middle size cities than in the largest ones. In both sets of cities, a high proportion black in the city sharply increases the rate of whites leaving. But in the largest cities, the rate also increases with an increase in integration over this period, while this is not true in the middle size cities. In the middle size cities, it is size itself which shows a strong effect on the rate of leaving. The whites are leaving much more rapidly from the larger districts than from the smaller ones. This is shown also by the overall lower rates of white school population decline in these cities compared with the largest cities: 11.7% for the first 20 compared to 8.5% for the next 50 in the 2-year period.

What does all this suggest? First, it is clear that whites with children in public school are leaving cities with high proportions of blacks, and that this is true in both large and middle sized cities. Second, it is clear that in the large cities, they are fleeing integration as well, at a fairly rapid rate. But third, in the middle size cities, they are not moving any faster from rapidly integrating cities than from others; they are simply moving faster from larger cities.

This last result suggests that the matter is certainly more complex than merely whites fleeing school integration. The flight from integration appears to be principally a large-city phenomenon. This may be related to an oft-noted concern of both black and white parents: a concern that they have little control over their schools and their children's education. This concern is most pronounced in the largest districts, and increases if their children attend schools at some distance from home.

It must be emphasized that the current analysis described is not completed. In particular, a more intensive study of the reaction of whites in different sized districts is necessary in order to reach firmer conclusions about what are the factors that affect this reaction. Once those are clear, then there may be some definite implications for policy changes in the way that school integration takes place, in large districts and small ones.

Conclusion

The processes of desegregation and segregation that I have discussed in this paper show the complexity surrounding social policy. In school desegregation, there has been a surprising absence of interest on the part of those formulating and implementing policy about the overall impact—as opposed to the immediately observable effect—of that policy. The results of these analyses show that the indirect consequences are far from negligible, and can sharply reduce or perhaps even in the longer run reverse the intended effect of the policy.

It may well be the case that in an area attended so fully by conflict, and in which there are no "policy-makers," but only advocates and opponents of change, nothing more rational in the formulation of policy can be expected. Yet it is possible that analyses which show indirect consequences of policies can lead to strategies on both advocates' and opponents' parts that lead to outcomes either would prefer to those we currently see.

Perhaps a broader conclusion about policy may be stated from these results. The extremely strong reactions of individual whites in moving their children out of large districts engaged in rapid desegregation suggests that in the long run the policies that have been pursued will defeat the purpose of increasing overall contact among races in schools. It is clear that for this purpose to be achieved, there should have been far greater attention to the reactions of whites with the economic means to move. Yet the instrument through which most desegregation was accomplished—the courts—must be blind to such considerations. Other branches of government can initiate policies such as desegregation in ways that excite fewer fears among middle class parents, and thus generate less counteraction. Thus a major policy implication of this analysis is that in an area such as school desegregation, which has important consequences for individuals and in which individuals retain control of some actions that can in the end defeat the policy, the courts are probably the worst instrument of social policy.

Yet this does not answer the central questions, for the other agencies of government, which can initiate policies that excite fewer of the fears that ultimately defeat the policy, have often failed to initiate them. It is clear that if school desegregation policies are not to further separate blacks and whites in American society, far greater coordinated efforts on the part of different branches and levels of government are necessary than have taken place until now.

Notes

[a] The coefficient on which this estimate is based is not statistically significant at the 5% level.

[1] AERA Distinguished Award Address presented at the Annual Meeting of the American Educational Research Association, April 2, 1975. The analyses reported were carried out by James Coleman, Sara Kelly (Urban Institute), and John Moore (Urban Institute), as part of a larger project at the Urban Institute. Partial support for the paper was provided by a grant from the Carnegie Corporation. The interpretations in the paper are those of the authors and are not to be attributed to the Urban Institute nor the Carnegie Corporation.

[2] The academic discipline that is best suited for this purpose is demography; as the most quantitative branch of sociology, it has developed techniques which show such indirect effects—such as the effect of the present age-specific birth rate in conjunction with the age composition of the population, upon future population size. It seems likely, that if governmental agencies are encouraged or goaded or shamed into developing a capacity of the sort described here, it will be through employing the skills of demographers.

[3] This is not yet a measure of segregation, but forms the basis for that measure, which will be described shortly. Two other measures of segregation are often used, and it is necessary to add a word about why neither of these is used. Most often as a measure of school segregation is given the proportion of black children in all-black schools in the district, or the proportion in schools with 90% or more black, or a similar variation. This measure is presumably used because it is easy to understand, and perhaps also in part because it is more directly related to school desegregation policies, which are often aimed at "eliminating the all-minority school," or "eliminating the predominantly minority school." It does not, howver, describe the experience of blacks as a whole, but only tells the proportion at one extreme. Also, it is not easily generalizable to the case when the number of groups is greater than two. Therefore, the measure used here was regarded as preferable.

A second frequently-used measure of integration is one used by Karl Taueber in his study of black-white residential segregation among blocks or census tracts in cities. It consists of the proportion of either racial group that would have to be moved from their present residence to another in order to make a precisely equal proportion of the two races in each block or census tract. This measure has some intuitive appeal, but was rejected because it does not give direct expression to a meaningful concept at the level of individuals. It also is not easily generalizable to a number of groups greater than two.

[4] "Spanish-surname" is the general designation for children of Latin-American backgrounds, including principally Puerto Ricans, Mexicans, and Cubans.

[5] A more serious, and related difficulty, is that a single measure cannot show the range of variation in these proportions as well as the average. We have calculated these variations for each system, but I will not report them here.

[6] This measure, unlike the measure of overall segregation, differs for blacks and whites: it is a weighted average of each district measure, with each district either weighted by the number of blacks in the district or the number of whites. I will use the black-weighted measure here.

[7] For the Outlying States, the minus preceding .04 means that within a system, whites are overrepresented in the average black's school, and thus there is, in effect, negative segregation. This is very likely because in these states, both blacks and whites are immigrants from other states, and tend to attend the same schools less than either attends the schools of the natives. Because column 6 shows overrepresentation, column 7 cannot be calculated.

[8] The size classification was based on 1972 enrollment. Washington, D.C., was excluded, because it is the only one of these districts whose schools are almost completely racially homogeneous. Thus the analysis is based on the other 19 of the 20 largest districts. The smallest of these was Atlanta, at 96,006.

[9] The answers to these questions were obtained by regressing proportional change in white school children in the district from 1970-72 upon proportion of school children black in 1970, the change in black schoolmates for average white child 1968-70, and logarithm of district size. The variance explained for the 19 largest systems was .52, and for the next .50, .47.

WHITE FLIGHT, DEMOGRAPHIC TRANSITION, AND THE FUTURE OF SCHOOL DESEGREGATION*

David J. Armor

with the assistance of
Donna Schwarzbach

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ABSTRACT

The earlier studies of the effect of desegregation on white flight were in conflict, largely because of methodological differences in study design and data analysis. The most recent studies have used more comparable methodologies and tend to show that under certain conditions desegregation does have a significant effect on white loss, although there is still disagreement on the size and duration of the effect.

The present study offers a demographic projection method for estimating the size and duration of the white phenomenon and applies the method to school districts experiencing court-ordered mandatory desegregation. In most cases the size of the effect is both large and long-term, accounting for 30 to 60 percent of all white losses over extended periods following desegregation. The white losses are such that, in many cases, the amount of desegregation -- defined as minority exposure to whites -- is declining, and for some districts has fallen below the pre-desegregation level.

Court-ordered desegregation, coupled with normal demographic trends, is producing increasing ethnic and racial isolation in many larger school districts. If this trend is to be stopped or reversed other remedies need to be considered. Given the strong public opposition to mandatory busing as well as the current legal situation, the prospects for metropolitan desegregation appear limited. On the other hand, voluntary methods have worked well in some cases and may offer a more viable alternative in larger cities.

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INTRODUCTION

Among the many debates that have raged over school busing, few have engaged social scientists with more intensity than the "white flight" debate. Although the white flight phenomenon has a long history in both public and social science discussions, it did not become a truly controversial issue in sociology until James Coleman's well-publicized work on the subject, in which he concluded that school desegregation was a significant cause of declining white enrollments in public schools (1975).

Shortly after Coleman's work appeared, three other major studies were published (or presented) which concluded, quite firmly, that Coleman's analysis was defective and that school desegregation has little or no effect on white flight. The first of these was a study by Reynolds Farley (1975), the second a study by Christine Rossell (1975), and the third a study by Thomas Pettigrew and Robert Green (1976). This latter study relied heavily on the Farley and Rossell data supplemented by some original analyses.

What makes the white flight controversy especially intriguing is that all four of these studies used substantially the same data base; namely, the public school ethnic enrollment reports published since 1967 by the Office of Civil Rights (OCR) of HEW. While social scientists frequently disagree about conclusions from data, one would not think such disagreement could result from analyzing as simple and straightforward a data base as this one. Moreover, while most methodological debates are esoteric and dull, this controversy has generated considerable heat both within and without the profession. Undoubtedly, one of the reasons is that a great deal is at stake in this debate, with major policy decisions hinging upon its outcome. A large number of educational policy makers and social scientists have been supporters of court-ordered desegregation as a means of attaining racial integration. If the white flight thesis is true, then court interventions seeking to eliminate segregation may actually be expanding it. In this event many judges, educators, and social scientists will be in the unfortunate position of promoting the very condition they seek to halt.

All of these earlier studies were based upon enrollment data through 1972 or 1973 at the latest, prior to implementation of many northern court-ordered desegregation cases (e.g., Denver and Boston). After the initial furor, both Farley and Rossell added enrollment data for subsequent years and refined their analysis techniques. As a result, they modified their original conclusions to some extent, finding more evidence for white flight due to desegregation than they had previously (Farley, 1977; Rossell, 1977a). Interestingly, these newer studies have not been well-publicized as yet, and many social scientists are unaware that there is now less disagreement on the fact of white flight. Disagreement still exists, however, over the size and duration of the effect, and the conditions under which it occurs.

Accordingly, given the importance of the issue for future policy actions, another look at the white flight phenomenon seems justified. This paper reconsiders the white flight issue in several ways. First, the works of Coleman, Farley, and Rossell are reviewed briefly. While some of their latest conclusions differ, due mainly to somewhat different analysis strategies, points of agreement will be emphasized. It is maintained that much of the remaining disagreement stems from a common failure to use demographic methods to establish underlying population trends.

Second, results of a new white flight study will be presented. The new study attempts to determine both the magnitude and the duration of white flight effects by using demographic projection techniques for the school-aged population. The method is applied to court-ordered cases, which are judged most important for future policy decisions. Although the courts have held that mandatory desegregation or "busing" is more effective than voluntary methods, this claim must be reevaluated in the light of induced white losses and the resultant possibility of resegregation. Changes in desegregation levels for court-ordered cases will be assessed and compared to a voluntary plan underway in San Diego.

Finally, implications for future school desegregation policies will be discussed. The reasons for white flight must be understood in order to improve upon current policies. If white flight is caused by prejudice and opposition to racially integrated schools, then mandatory plans may continue to find support. On the other hand, if white flight is caused by opposition to mandatory reassignments away from neighborhood schools, voluntary plans may prove more successful than mandatory plans for intradistrict desegregation, at least for those districts not yet under court orders. For court-ordered districts experiencing resegregation, of course, metropolitan remedies--mandatory or voluntary--may be the only solution.

THE COLEMAN AND FARLEY STUDIES

Coleman and Farley used a similar conceptual approach to study white flight, although their initial methods differed considerably. Basically, their approach is to analyze the relationship between changes in white enrollment and changes in a quantitative desegregation index for the same period.

In Coleman's approach the dependent variable is annual change in white enrollment Δw, from 1968 to 1973, while the independent variables are changes in desegregation Δd,[1] proportion black enrollment p_B, log of district size n, a region dummy r (North versus South), and the extent of desegregation within the SMSA d_s. Coleman then examines various linear regression models of the form

$$\Delta w = f(\Delta d, p_B, n, r, d_s) \qquad (1)$$

applied to the largest 21 central city school districts and the next 46 largest. He also tested various interactions with Δd, including $\Delta d \times p_B$, $\Delta d \times r$, and $\Delta d \times d_s$.

In Coleman's best model (with an R^2 of .60 for the 21 largest districts and .40 for the next 46 districts) the strongest and most consistent coefficients occur for changes in desegregation, desegregation within the SMSA, and the interaction between desegregation change and proportion black. If we interpret SMSA desegregation as a surrogate for the existence of white suburbs, then Coleman's major finding is that white loss is accelerated whenever desegregation occurs in large, central city school districts with a substantial proportion of black enrollment, and this effect is enhanced whenever predominantly white suburbs exist around the district. He did not find any evidence for substantial long-term effects, although he admitted his analysis was not adequate for this test. Also, he found the effect strong in the South and much weaker in the North, but it must be emphasized that his latest data was for 1973, prior to the start of large-scale desegregation in larger northern cities.

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[1] The desegregation measure used is a relative exposure index which measures the average proportion of white students in schools attended by the average black student (Coleman, 1975).

Farley's first analysis (Farley I) was based on 125 school districts for cities with over 100,000 population (excluding those districts with less than three percent black). Like Coleman, he examined the changes in white enrollment from 1967 to 1972, and related ? it to change in a desegregation index (a different one than Coleman's[2]). But here the similarity ends.

Farley analyzed *total* change in white enrollment from 1967 to 1972 rather than year-to-year changes. Since Coleman found the largest white losses occurred in the first year following a significant desegregation action, longer time-intervals might obscure the relationship. More important, Farley did not experiment with more complex regression models, and in particular he did not test for the crucial interaction between desegregation and proportion black. His main results showed only the bivariate relationship between white loss and desegregation change, separately for the North and the South; in a footnote he showed a three-variable regression using desegregation change and proportion black. Perhaps not surprisingly, then, he did not find evidence to support Coleman's conclusion.

Farley's second analysis (Farley II) was quite different (1977). Basically the same set of school districts were used as in Farley I, but enrollment data was added for 1973 and 1974. More crucial, however, he applied a regression model much like (1) to *annual* changes in white enrollment. He also added several variables not used by Coleman including year, a metropolitan district versus central city district dummy variable (Coleman analyzed only central city districts), and average white enrollment change in the two years preceding desegregation ($\Delta\bar{W}$).

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[2] The index of dissimilarity (Taueber and Taueber, 1965).

With these modifications, Farley II comes to conclusions not unlike Coleman's. The highest t ratios were found for proportion black, change in desegregation, the metro variable (such that metro districts have less loss than central city districts), and the interaction terms Δd X p_B, Δd X n, and Δd X $\Delta\bar{w}$. In other words, the effect of desegregation on white loss will be strongest in larger central city school districts that have a substantial proportion of blacks and that show pre-existing white enrollment declines. Coleman found that, for a large central city school district with white suburbs and 25 percent black, a change of 20 points in his desegregation index is associated with an additional white loss of 8 percent; Farley II finds that, for a large central city district with 30 percent black enrollment, the incremental white loss associated with a 20 point change in his desegregation index is 6 percent.

While it is encouraging that the Coleman and Farley II analyses show a convergence in conclusions, there are still many analytic difficulties and several unanswered questions. First, their common conceptual approach makes the assumption that only the amount, and not the type of desegregation makes a difference. If the reasons for white flight are mandatory reassignment to non-neighborhood schools, rather than integrated schools per se, then changes in a desegregation index caused by voluntary transfers of minority students to predominantly white schools might not cause white losses. Moreover, it is possible that white flight will be diminished or non-existent whenever desegregation -- mandatory or voluntary -- is supported by the community rather than being imposed by a court upon a protesting community.

A second and possibly more serious problem is that no attempt is made to model the basic demographic processes that are the primary causes of white losses in the absence of desegregation; namely, white out-migration to the suburbs and declining white birth rates. If large-scale desegregation causes white loss, and if the mechanism involves conscious choices of white families, then it is possible that some white losses--"anticipatory" white flight--might occur prior to the onset of desegregation. Such a result would be missed in Coleman's model and confounded with an independent variable in the Farley II model (average white loss for the previous two years).

Finally, neither analysis deals adequately with the issue of longer-term effects of desegregation, particularly for large scale court-ordered plans. The main reason, of course, is that the earlier works had data for only 1972 or 1973, and courts did not begin issuing large-scale desegregation orders until 1970 or 1971. Even 1974 is too early to determine long-term effects in the North, since many northern desegregation orders were not implemented until 1973 or 1974. Clearly, the full policy implications of white flight cannot be evaluated without knowing the longer-term effects of desegregation.

THE ROSSELL STUDIES

The original Rossell study (Rossell I, 1975) took a different conceptual approach for assessing the effects of desegregation on white flight. Observing that Coleman's analysis could not separate the effects of government-imposed desegregation from other types of desegregation, including changes in natural residential patterns, she adopted a quasi-experimental design. Her basic approach is to compare pre-desegregation rates of white loss with post-desegregation losses for school districts that implemented school desegregation plans, and to then compare shifts, if any, to a group of control districts. The districts chosen for study comprised a non-random sample of 86 northern school districts (a subset of the National Opinion Research Corporation's Permanent Community Sample of 200 cities that were in the North and had at least 3,000 black residents). The year of desegregation was established by means of a mail questionnaire sent to school district administrators.

While Rossell I had a distinct advantage over the Coleman and Farley work by identifying government and court-ordered desegregation, a number of analysis problems hampered this first study, leading to the conclusion of no relationship between desegregation and white flight. First, the dependent variable used was not change in white enrollment but, rather, change in the percent white. This measure confounds the possibly different movements of two independent populations, whites and blacks. For example, the percent white will decline if black enrollment is increasing while white enrollment is stable.

critical problem in Rossell's analysis, since the use of pre-desegregation enrollment trends assumes that no white loss is occurring due to anticipatory effects or to the effects of less major desegregation actions. If such effects occur, then the pre-desegregation trend being used to compare against post-desegregation trends may be steeper than they would have been with no desegregation at all. Clearly, other types of analysis must be adopted to investigate this possibility.

There have been other white flight studies besides the ones reviewed so far. For the most part, however, they provide little additional information over and above the combined Coleman, Farley, and Rossell findings. The Pettigrew and Green study (1976) does present some new analyses for the 21 largest cities, but their approach is basically the same as Farley I: they do not analyze year-to-year changes; they do not include critical interaction terms in their models (especially $\Delta d \times p_B$); their data stops in 1973; and they do not identify court-ordered desegregation. A study by Fitzgerald and Morgan (1977) attempts to offer a broader model of white out-migration from larger cities (over 50,000) using such variables as crowded housing, crime, and poverty. But these variables are not studied on a yearly basis in association with desegregation changes, and no demographic analysis is conducted to establish changes in white birth rates.

A NEW STUDY

Given the latest works of Farley and Rossell, there seems to be substantial agreement on several critical points. First, the fact that white loss is associated with desegregation in some instances is not in dispute. Second, it is a conditional relationship: it occurs under some conditions but not others. Third, the effect is seen most clearly in the year that desegregation takes place, which in most cases is the first year of a plan's implementation except when a plan is implemented in several phases (as for Boston or Oklahoma City).

Although there is variation in the nature of the conditions cited by each investigation, some convergence is apparent when all three studies are compared. First, the effect appears to depend upon a

After a desegregation action, if black enrollment levels off and white enrollment starts declining, the percent white will continue to drop, thereby masking a significant shift in population movements. This phenomenon has actually occurred in a number of desegregation cases, including Boston.

Like Farley I, Rossell I enrollment data stopped in 1972, and no attempt was made to control for most of the significant factors identified by Coleman as intervening in the relationship between desegregation and white losses, such as proportion black, existence of white suburbs, and so forth. Finally, the effect of desegregation was evaluated by fitting a regression line to pre-desegregation white loss rates and comparing this slope to a post-desegregation regression slope. Since the year of desegregation is simply the year of the most significant government action, the slope of the pre-desegregation regression might be influenced by other desegregation events -- or several events -- prior to the year chosen. For example, the year of desegregation chosen for San Francisco is 1971, when court-ordered busing began, but a major school-board busing plan was adopted in 1969 and implemented in 1970, during which time substantial white losses occurred. As a result San Francisco does not have significant white flight in Rossell's studies.

Rossell II (1977) represents a major updating with more data and more extensive analyses. She added southern school districts as well as enrollment data through 1975. She also grouped the districts according to type of desegregation plan (government-ordered or school board-initiated), extent of desegregation, and region. In this new analysis she finds more districts with significant white losses associated with desegregation changes. The strongest effects are found for those districts with court-ordered desegregation that have substantial portions of white students reassigned by the plan.[3]

This improved analysis still has several difficulties. Districts are not grouped adequately by size, by percent black enrollment and by availability of white suburbs. Moreover, like Farley and Coleman, there is no demographic analysis against which to establish white loss rates in the absence of desegregation. This is an even more substantial proportion of black (or minority) students, perhaps on the order of 20 to 25 percent. Second, the effect appears strongest for central city districts surrounded by accessible white suburbs (e.g., Boston) and weakest for large metropolitan school districts surrounded by minimally developed rural areas (e.g., Charlotte, N.C.). Finally, the effect appears strongest when there is a significant shift in the racial balance of schools, and especially when white students are included in the shift. In the Coleman and Farley studies this shows up as a desegregation index change of 20 points or so, while in the Rossell study this corresponds to reassignment of at least 20 percent or so of black students or at least 5 percent or so of the white students.[4]

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[3] A more recent paper by Rossell was received too late for full consideration here (Rossell, 1978). In brief, multiple regressions show that first-year losses are most strongly related to percent black, percent whites reassigned, their interaction, and district/SMSA segregation ratio. No long-term effects are found.

In the vast majority of cases, however, shifts on this order of magnitude rarely occur outside of court-ordered desegregation plans. In Coleman's list of the 70 largest central city districts, 16 showed an annual change of 20 percentage points or more on his desegregation index, and only one was not involved in a court-ordered desegregation case (Wichita, Kansas, which was involved in a HEW mandate). Of the 86 Rossell II school districts, 22 showed a change in the index of dissimilarity of 20 points or more, but only 6 were not brought about by court order (Wichita and Tyler and Amarillo, Texas, which were involved in HEW mandates; and Berkeley and Riverside, California, and Ann Arbor, Michigan, which had school-board initiated plans). Perhaps more important, of the 16 Rossell II districts that showed at least 5 percent of white students reassigned -- which may offer the greatest potential for white flight -- only Berkeley was not by court order.

It seems fairly clear, then, that while changes in desegregation indices are the empirical correlates of white losses, large changes are generally brought about only through court-orders.

Given this state of knowledge, the new study was designed to focus specifically on court-ordered desegregation cases in which mandatory reassignment (as opposed to voluntary transferring) takes place. Furthermore, the emphasis of the study is on certain questions not adequately answered by the existing research; namely, the magnitude and duration of the effect of court-ordered mandatory desegregation. In order to answer these questions with greater precision, we have employed demographic techniques to project school enrollments in the absence of desegregation.

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[4] The percentage of students reassigned is actually based on those students who show up at schools to which they are reassigned. Thus when white flight occurs, the percent of white students actually reassigned is probably considerably higher.

Methods

The potential universe for the study consisted of all school districts undergoing court-ordered mandatory desegregation (COMD), by which is meant a desegregation plan involving mandatory reassignment of students arising from a court order. Mandatory reassignment plans not due to court order and court-ordered voluntary plans will not be analyzed in detail. (This is not a serious restriction since there are relatively few such cases.)[5] Given the Coleman and Farley findings, the universe was further restricted to school districts enrolling over 20,000 students and having at least 10 percent minority enrollment in 1968, which is prior to the start of COMD cases.[6]

Searches of published studies, legal references, and telephone interviews with school district officials yielded 54 school districts meeting the selection criteria. Excluded from the present study are Stockton, California, Dayton, Ohio, Milwaukee, Wisconsin, and Omaha, Nebraska whose court-ordered plans did not begin until 1976, and Charleston, South Carolina, for which complete data could not be obtained.

In addition to the OCR enrollment data, extensive telephone interviews were conducted with school district officials to determine critical dates of court orders and plan implementation; characteristics of plans, including number of schools affected by pairing, clustering, or other reassignment mechanisms; and the existence and accessibility of developed suburbs. Written court orders and plans were obtained wherever possible, and additional information about suburbs was obtained by examining maps and OCR enrollment data for surrounding school districts. Two different types of analyses have been conducted with the data.

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[5] Rossell lists 8 board-initiated, city-wide, mandatory plans all but one of which (Berkeley) had no white reassignment; none but Berkeley had significantly accelerated white losses. The author knows of only two court-ordered voluntary plans meeting the inclusion criteria after 1971: Dayton, Ohio, which was recently ordered to implement a mandatory plan in 1976, and San Diego which started a court-ordered voluntary plan in 1977.

[6] Most COMD cases occurred after the Swan v. Board of Education (402 U.S. 1), decided in 1971.

Analysis I. Again, one difficulty of the Coleman, Farley, and Rossell analyses is the presumption that white flight will occur only in the year when there is a change in a desegregation index or during the years following the largest desegregation action. But if the white flight phenomenon is real, it is reasonable to expect that some "anticipatory" flight will take place when the community becomes aware that mandatory desegregation is about to take place. This might occur after a court order but prior to implementation, while appeals are being exhausted, as in cases like Denver and Detroit. It also could occur during an intense community controversy when a lawsuit is brought but before a court order is issued, as in cases like Boston, Pasadena, and Pontiac. Such possibilities cannot be investigated with the methods used in these other studies.

In an attempt to solve this problem, the first analysis was a modified quasi-experimental design with pre- and post-desegregation enrollment changes compared to a control group (Armor, 1976). The major differences between this analysis and Rossell's are (a) following the Coleman and Farley II findings, districts are grouped according to proportion of minority enrollment and the availability of suburbs and (b) pre-desegregation enrollment changes are measured prior to any significant court orders or partial implementations. A revised summary of this analysis, which encompasses all 54 districts, will be presented.

This first attempt to establish a loss rate prior to the first significant court order was not wholly satisfactory. First, in some cases the time of the court order and the time of the actual start of busing are separated by several years, raising the possibility that demographic changes alone -- such as declining births -- might explain some of the difference in loss rates. That is, post-desegregation loss rates might have been higher than pre-desegregation loss rates even if the court case had not occurred. The second problem is that many desegregation cases are long and complex, with many orders and controversies covering an extended period of years. Locating a single year to divide the pre- and post-desegregation period is liable to generate much argument and disagreement.

Analysis II. A more adequate solution for these problems requires some sort of demographic method similar to those used by many school districts to project future school enrollments. The unique advantage of projecting a school age population is that at any one point in time the cohorts who will be entering school during the next five years actually exist in the population at large (i.e., children born in the previous five years). Thus birth data, adjusted for net migration rates, permit projection of a future school population five years from any given year. This in turn offers a test for both anticipatory and long-term white flight.

The demographic projection method used here relies on birth data from 1950 to 1972 and census data for 1950, 1960, and 1970. Persons born from 1950 to 1962 represent the potential school age population in 1967, with most 12th graders having been born in 1950 and most kindergarteners in 1962. If all births survive and there is no net migration, then the sum of births from 1950 to 1962 would be the projected school age population for 1967. The projected population for 1968 would be obtained by subtracting the graduating seniors (1950 cohort) and adding the incoming kindergarten (1963 cohort), and so forth for succeeding years, with 1972 births being used to project the 1977 population. Thus year-to-year changes in the potential population can be calculated and projected for 1968 to 1977 using birth data that is at least five years prior to any given year. The crucial advantage of this approach for school desegregation cases is that a given event, such as filing a lawsuit or a court order, cannot affect birth rates that preceded it by several years. This is especially useful for extended litigation cases, where an initial order might occur in 1971 but not be implemented until 1974. Projecting the potential change between 1971 and 1974 depends upon 1969 births at the latest, two years prior to the court order.

Of course, not all births survive, and net migration can occur which reduces (or increases) a potential cohort by the time it reaches any given grade level. Hence birth rates must be adjusted to reflect both survival and net out-migration. This can be done using 1950 to 1970 census data to establish cohort retention rates. For a number of reasons, including statistical reliability and coverage, the 0-4 cohort is used for estimating migration. The 1950 to 1960 retention rate is simply the ratio of white children aged 10 to 14 in 1960 to white children under 5 in 1950. Since this ratio is actually a 10-year rate, we can convert it to an 11-year rate by using an exponential law; for a given birth cohort this gives us the retention rate when that cohort reaches sixth grade, which is midway in the school career. Rates would of course be lower in earlier grades and higher in later grades, but we assume that the midpoint is very close to the average. For instance, if the 11-year retention rate is .70, then 1950 births can be reduced by .70 to estimate that proportion who would be in the school population 11 years later. A similar rate can be calculated for 1960 to 1970; in most cases it is lower than the 1950-1960 rate reflecting the fact that net out-migration for whites is higher in the 1960's than in the 1950's. This rate is applied to births in 1960. Since annual census data is not available, our method interpolates retention rates between 1950 to 1960, assuming that the annual change occurs in equal increments. Given the relatively steady growths/declines in most school populations, once birth cohort changes are taken into account, this is not an unreasonable assumption for our purposes.

The critical question is how to adjust 1960's births for net migration during the 1970's; this requires a retention rate for 1970 to 1980. We have used two approaches: Method A assumes that net white out-migration is the same in the 1970's as in the 1960's; and Method B assumes that whatever change occurs between 1950-1960 and 1960-1970 (which is nearly always a decrease) also occurs between 1960-1970 and 1970-1980. Hence if the retention rate drops from .7 to .6, the estimated 1970-1980 retention rate under Method B would be .5.

An important feature of the demographic method is that its validity can be tested by examining projected and actual loss in years prior to a desegregation controversy. In applying the method to numerous cities in our sample, Method A usually produces a better fit to enrollment losses prior to desegregation events, particularly when a significant desegregation event occurred by 1970. Method B may overstate out-migration in the 1970's, particularly since out-migration did not get underway in most cities until the late 1950's. Also, if desegregation actually began in 1970 and some white flight has occurred, the 1970 census will reflect accelerated out-migration. Accordingly, the projections in this report are based on the method that gives a better fit to actual losses prior to the start of any significant court action.

For the purpose of comparing projected and actual school enrollments, annual rates of change are used rather than absolute numbers. The reason is that even correcting for net out-migration, projected school populations usually differ from the actual school enrollments because (1) not all 5 year olds go to kindergarten, (2) some students drop out before age 17, (3) some children attend private schools and (4) in a few cases school districts are slightly larger (or smaller) than civil divisions used for birth and census counts. Thus the projected school enrollment starts with the actual school enrollment as of a certain year (usually 1967 or 1968) and is reduced by the rates of change derived from the projected school-age population.

To put all this more formally, the 10-year retention rate for year i, R_i' is found by

$$R_{50}' = N_{60}^{10-14}/N_{50}^{<5}$$

$$R_{60}' = N_{70}^{10-14}/N_{60}^{<5} \qquad (2)$$

$$R_{70}' = R_{60} \qquad \text{(Method A)}$$

$$R_{70}' = R_{60}-(R_{50}-R_{60}) \qquad \text{(Method B)}$$

The 11-year rate R_i is found by applying the compound interest law to R_i' to obtain a yearly rate, and then converting this back to an 11-year rate; thus

$$R_i = (R_i')^{11/10} \qquad (3)$$

Rates for intermediate years are found by interpolation (and for 1971 and 1972 by extrapolation of the 1960-1970 trend). Then the initial projected white population in 1967 is given by

$$W_{67} = \sum_{i=50}^{62} (R_i B_i) \qquad (4)$$

where B_i are white births in year i. To get the projected population in 1968 we subtract $R_{50}B_{50}$ (1967 graduates) and add $R_{63}B_{63}$ (1968 kindergarten) to W_{67}, and similarly for successive years. The projected loss rates are then $1 - W_{t+1}/W_t$, and these are applied to the 1967 or 1968 actual school enrollment to obtain the projected enrollments.[7]

In most cases the projection method is fairly close to a linear projection of pre-desegregation losses, provided that no years with significant desegregation activity are included, although generally the demographic method yields somewhat steeper rates of loss. The reason is that the declining birth rates in the sixties are coupled with very high birth rates in the fifties. It can be shown that linear increases in births coupled with subsequent linear decreases in births can combine to yield non-linear increases and decreases in school age populations.

Another refinement is required for certain districts. White birth data includes Mexican-American births, and in western school districts where this population is substantial white births must be reduced accordingly. This is accomplished by using school ethnic enrollments to project relative proportions of Mexican and Anglo back to 1960 and 1950 and applying an estimated Anglo fraction to the white birth rate.

It is emphasized that the method used here does not attempt to model the out-migration process itself, but rather takes out-migration as a given and (by our model) assumes that those forces operating to cause (or accelerate) out-migration between the fifties and sixties operate to cause it (or increase it) in 1970's. The central question in our approach is not whether court-ordered desegregation causes white loss, but rather whether desegregation causes an increase in white loss rates over and above what would have happened without it, assuming -- conservatively -- that out-migration would continue in the 1970's. It is possible that changes in other unmeasured events in the 1970's including crime, higher taxes, and other urban problems might have accelerated white loss rates in these cities, but the out-migration rate used for the 1970's, based on known trends, probably incorporates most of their effects.

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[7] Raw data and calculations are provided in the Appendix.

A final point on methods deserves comment. Although we are using the term "white flight," in keeping with customary usage among researchers in this field, it must be emphasized that we are not studying only residential relocation. As applied to the school desegregation field, white flight means white losses in school enrollments in excess of what would have been observed without desegregation. Given this meaning, there are three major processes which can give rise to white flight from public schools: (1) residential relocation outside the district; (2) transfer of children from public to private schools; and (3) failure of new area residents to replace regular outmigrants who are leaving the area for reasons unrelated to desegregation. The third source is frequently overlooked. Although our methods do not enable systemmatic apportionment of white flight according to these three sources, special data from one school district will enable a preliminary look at this issue.

Results

Analysis I. One can get a broad picture of the white flight phenomenon through the crude "quasi-experimental" analysis applied to all 54 districts. First, the districts are grouped according to characteristics already known to be related to white losses; namely, the proportion of minority students, the availability of suburbs, and region.[8] To determine whether white flight exists, post-desegregation loss rates are compared to pre-desegregation loss rates and to analogous loss rates for a control group.

A summary of this analysis is shown in Table 1. It is readily apparent that, if there is a white flight effect, it appears most prominent among school districts that have over 20 percent minority and accessible suburbs. In these cases the northern post-desegregation white loss rate is three times the pre-rate, and double the rate in the control districts for the first two years after the start of desegregation. Moreover, the loss rates remain high, compared to both the pre-rate and the control district rate, 3 and 4 years after desegregation. No appreciable difference is found for northern and southern districts within this category; this differs from Coleman's results, which showed a stronger effect for southern districts. However, Coleman's data stopped prior to the start of court-ordered desegregation in many northern cities.

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[8] Size of district is controlled by confining the analysis to districts with over 20,000 enrollment. The amount of desegregation is not controlled, but since all are court-ordered plans the amount of mandatory reassignment is substantial in all but a few cases.

Table 1

ANNUAL ENROLLMENT CHANGES BEFORE AND AFTER COURT-ORDERED MANDATORY DESEGREGATION

Type of District	Average Annual Percentage Change			
	Two years Pre-Order	Two years Post-Start	3-4 years Post-Start	Number of Districts
Over 20% Minority, Suburbs				
Northern White[a]	-3.6	-11.5	-8.4	(9)
Southern White[b]	-3.2	-11.6	-8.8	(16)
Minority	+3.6	- 0.6	+0.8	(25)
Over 20% Minority, No Suburbs[c]				
White	-0.8	-6.0	-1.9	(15)
Minority	+1.7	+0.4	+0.4	(15)
10-20% Minority[d]				
White	+1.0	-2.3	-2.5	(5)
Minority	+1.4	+2.0	+2.2	(5)
Florida Districts[e]				
White	+2.4	+0.6	+1.6	(9)
Rossell Non-desegregation Districts[f]				
White North	-2.7	-5.0	-5.0	(18)

[a] See Table 2 for districts.

[b] Dallas, Houston, Ft. Worth, Texas; Atlanta, Georgia; Oklahoma City; Birmingham, Alabama; Little Rock, Arkansas; Memphis, Nashville, and Chattanooga, Tennessee; Norfolk, Richmond, and Roanoke, Virginia; Greensboro and Raleigh, North Carolina; Jackson, Mississippi.

[c] Mobile and Montgomery Counties, Alabama; Bibb, Chatham, Muscogee, and Richmond Counties, Georgia; Louisville-Jefferson County, Kentucky; Baton Rouge, Shreveport, Louisiana; Winston-Salem, Charlotte, North Carolina; Greenville, South Carolina (data for Charleston incomplete); Austin, Texas; Portsmouth, Newport News, Virginia.

[d] Minneapolis; Las Vegas; Tulsa; Lexington, Kentucky; Fulton County, Georgia.

[e] All are counties; Palm Beach, St. Petersburg, Pensacola, Daytona, Gainesville, Ft. Lauderdale, Miami, Jacksonville, Tampa are the main cities in their respective county school districts.

[f] Rossell northern "control" and "token plan" districts which reassigned no white students and less than three percent black students and which had total enrollments over 20,000 with 20-60 percent minority in 1968. Pre-order is the average annual loss rates for 1969 and 1970 (prior to the start of most court-ordered mandatory desegregation); 1-2 years post-start is average loss for 1972 and 1973; 3-4 years post-start in average loss for 1974 and 1975. See Appendix for list of districts.

Districts that have substantial minority enrollments but less (or no) access to suburbs, all of which are southern county-wide school districts, also appear to show an effect, but it is smaller in absolute terms and drops off rapidly in the 3rd and 4th years. Actually, the rate of acceleration of white loss (from -0.8 to -6.0) is greater than for the districts with suburbs, due mainly to the existence of several districts which were growing prior to the court order (e.g., Charlotte, North Carolina and Newport News, Virginia) and which stopped growing after desegregation. This raises the possibility that some white flight effects are manifested by the slowing down of white growth rather than the acceleration of white decline. In any event, from the point of view of providing desegregated education such an effect has less policy relevance, since a relatively stable white population is all that is needed to maintain racially balanced schools.

School districts with 10 to 20 percent minority have no significant white losses associated with COMD. The underlying reason undoubtedly has to do with the fact that relatively little reassignment of students -- especially white students -- is necessary in such cases, thereby minimizing the opposition by white parents. For example, before Minneapolis desegregated in 1973 no school was predominantly minority, and according to Rossell, only 7 percent of black students and 1 percent of white students had to be reassigned to accomplish desegregation.

Finally, I have grouped the Florida districts together because they represent a distinctly different situation. All Florida districts were desegregated by a state court order between 1969 and 1971, and all are very large county-wide school districts. Thus the white flight phenomenon can occur in Florida only if whites leave (or do not move into) the state or if they enroll in private schools. This apparently has not happened to any great extent, and therefore the Florida group represents the only group where a majority of the school districts are still showing white enrollment gains well into the 1970's. These districts clearly show that the white flight phenomenon is conditional, with crucial dependence upon the environment surrounding the desegregating district.

In summary, the quasi-experimental analysis shows that the most serious white flight effects may occur in districts having substantial proportions of minorities, which require more extensive mandatory reassignment to accomplish desegregation, and in central-city districts with available suburbs, which offer the opportunity for convenient residential relocation. Districts with substantial minority populations but without developed suburbs -- all of which are county-wide or "metropolitan" districts -- may have less white flight due to the inconvenience of relocation. The fact that there is some apparent white flight in these districts, especially in the first year or two, raises the possibility that private school transfers may well comprise a significant portion of white losses in metropolitan desegregation cases.

Analysis II: Demographic Method. While the quasi-experimental method is suggestive, it is not definitive. The pre-court order loss rates may be affected by anticipatory white flight, leading to an underestimate of the true magnitude of the effect. Conversely, demographic trends may be such that loss rates in the desegregating districts would be increasing even in the absence of desegregation; if so, the pre-post comparison would overstate the size of the effects, especially the long-term effects.

The demographic analysis can help alleviate these problems. We have applied demographic projections to those districts in the first group in Table 1, which are the most likely candidates for white flight. These districts include all of the important busing cases in larger cities, including Dallas, Memphis, Denver, Boston, and San Francisco. The critical questions at issue here are the magnitude and duration of the effect, given a demographic projection of what school enrollments would have been without the desegregation activity.

The average actual and projected white loss rates are shown for the nine northern districts in Figure 1. Prior to the filing of lawsuits in these districts, the average projected loss rate is nearly identical to the actual loss rate. But after the lawsuits were filed, prior to the start of desegregation, the actual loss rates are over one and one-half the projected loss rates, thereby offering evidence that anticipatory effects do occur.

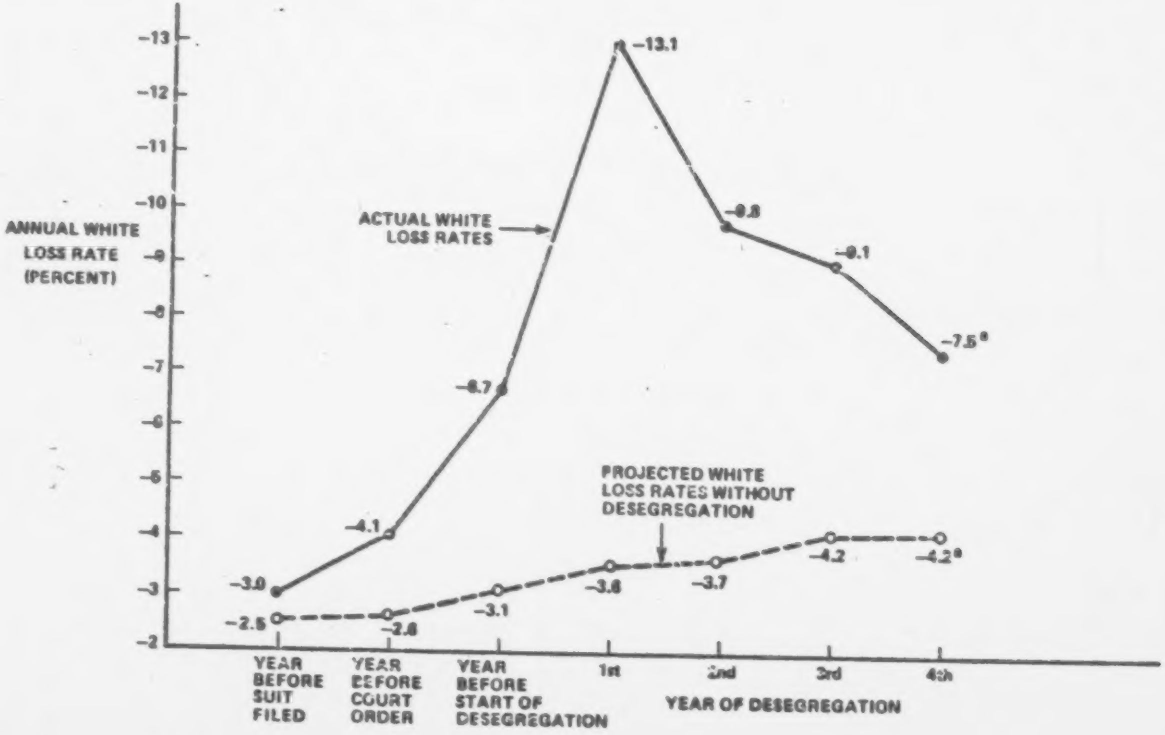
The most substantial acceleration of white loss for these districts occurred in the first year of desegregation implementation, when the actual rate is nearly four times the projected rate. The actual rates of loss drop somewhat after the first year, but they remain between 1-1/2 to 2-1/2 times greater than projected loss rates up to four years after the start of busing. It would appear, then, that the magnitude and duration of the effect of court-ordered desegregation may have been underestimated by previous studies.

In order to demonstrate the impact of these accelerated loss rates, it might be helpful to give a hypothetical example. Consider a school district with 50,000 white students prior to the lawsuit, and assume that the loss rates in Figure 1 apply to six consecutive years following the filing year. At the end of the six-year period the projected white loss would be about 10,000 students, while the actual white loss would be about 20,000. Therefore, the average long-term effect of the court intervention is to double the number of white students lost, over and above the losses due to demographic factors alone.

It is important to note that the projected loss rates do in fact rise in these districts, on the average, from 2.5 to 4.2 percent over the six to seven years spanning their desegregation periods. This reflects a combination of long-term declines in births and continuing white out-migration during the 1970's. Thus a comparison of post- to pre-desegregation loss rates will probably overstate white flight effects, especially over the long run. However, neither the magnitude nor the pattern of these moderate demographic changes can begin to explain the dramatic increase in white loss rates during a desegregation controversy and after its implementation.

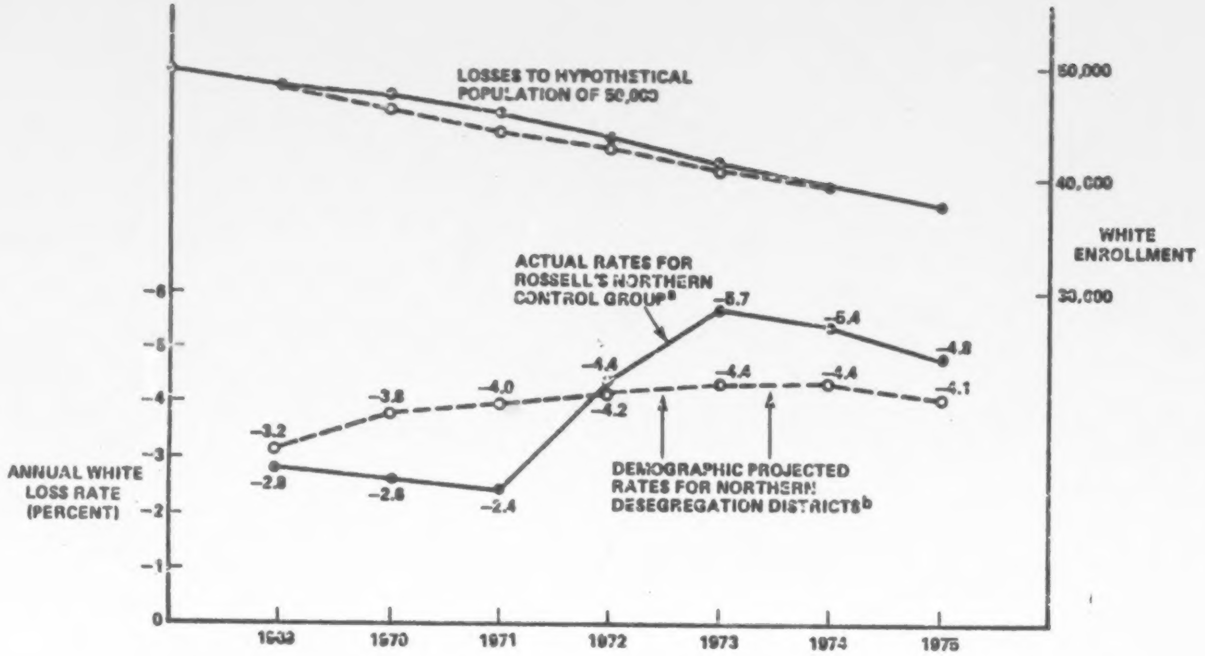
Another way to test the validity of these demographic projections is to compare them to other similar districts not experiencing desegregation. Figure 2 shows the projected rates for the northern desegregation cases compared to the actual loss rates of the 18 school districts

FIGURE 1 – ACTUAL AND PROJECTED WHITE LOSS RATES FOR NORTHERN SCHOOL DISTRICTS WITH COURT-ORDERED MANADTORY DESEGREGATION



[a] EXCLUDES DETROIT

FIGURE 2 – DEMOGRAPHIC PROJECTION FOR NORTHERN DESEGREGATION DISTRICTS COMPARED TO ROSSELL NORTHERN CONTROL GROUP



[a] DISTRICTS HAVING BETWEEN 20 AND 90 PERCENT MINORITY, AND OVER 20,000 ENROLLMENT IN 1968.

[b] EXCLUDES PRINCE GEORGES COUNTY.

from Rossell's northern non-desegregation group matched in size and percent minority.[9] The fit is fairly good, although the control districts show somewhat more variability with a decrease in loss rates followed by a steeper increase from 1971 to 1973 than the projected rates. However, the total losses explained by these two sets of rates, shown in the upper portion of Figure 2 for a hypothetical population, are nearly exact. Therefore, we conclude that the demographic projection method being used here yields realistic loss rates when compared to similar non-desegregating districts.

It might be worthwhile to examine the detailed results for one of these districts. Figure 3 shows the projected and actual white enrollment in Boston, which has been one of the most celebrated court-ordered cases. First of all, it is observed that the projected and actual loss rates for Boston are very close for the five-year period between 1967 and 1972. This is evidence that, for Boston, a projection method based on birth rates and net out-migration (R_1 is .67 for the fifties and the sixties) can account virtually for all of the white losses during this period. But in 1973, after a lawsuit was filed and after considerable controversy over actions by the State Board of Education, the actual loss rate is -6.6 compared to a projected rate of -3.8. While this is not a large difference, it does reflect some anticipatory behavior; any linear projection that includes the 1973 white enrollment for the pre-desegregation trend (such as Rossell's) would clearly overestimate the white losses in the absence of desegregation. The Boston plan was implemented in two phases, with Phase II involving more students than Phase I. When Phase I was implemented in 1974, the actual loss rate was nearly four times the projected rate; when Phase II was implemented in 1975, the actual rate of loss jumped to over five times the projected rate. In the third year of implementation the loss rate was 10 percent, which is still more than twice the projected rate.

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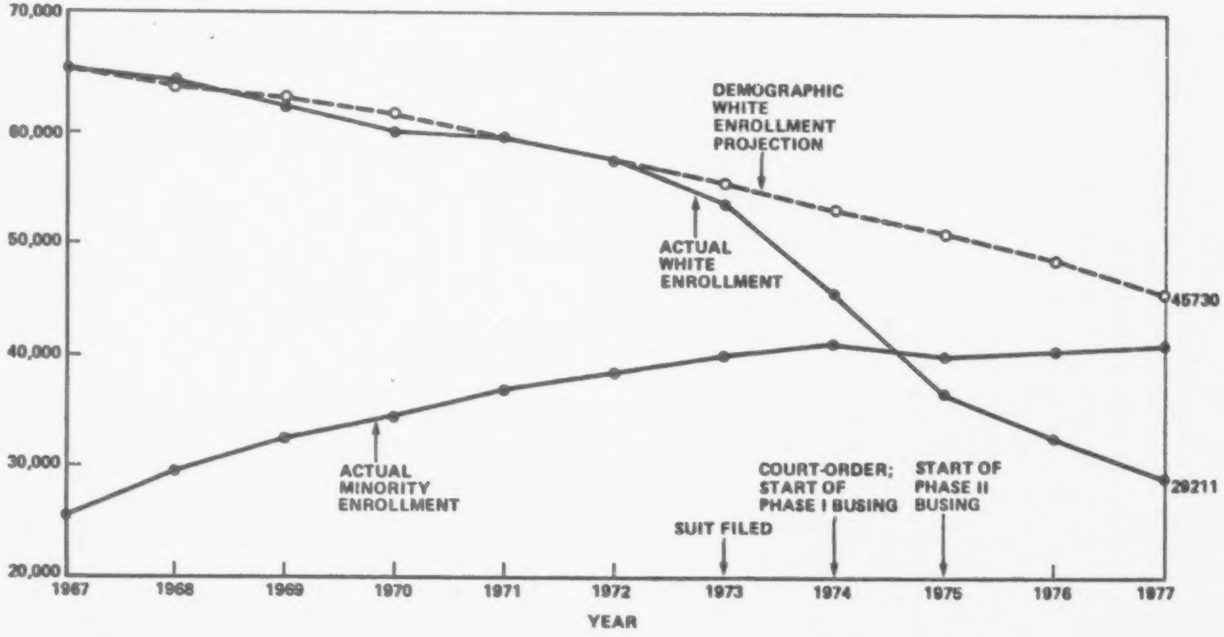
[9] Prince Georges County is excluded from the desegregating districts because none of Rossell's districts had comparable growth rates during the late 1960's. It should also be noted that some of Rossell's districts, including Grand Rapids, Cleveland, Cincinnati, and Omaha were involved in court actions in the early 1970's, so that anticipatory white flight might be a partial cause of the rise from 1971 to 1973. In fact, it is hard to find any large school district with a substantial minority enrollment that has not been involved in some type of desegregation lawsuit.

FIGURE 3 – PROJECTED AND ACTUAL ENROLLMENT FOR BOSTON



Before the desegregation action in Boston (1972) there were 57,000 white students, but by 1977 there were only 29,000. Of this total decline of 28,000, about 16,000 (or three-fifths) is attributable to desegregation activities. As a direct result of court-ordered busing, Boston became a majority black school district in 1975. It is interesting to note, also, that minority enrollment stopped growing rather suddenly in 1975; while not shown on the graph, projected black enrollment should have continued to grow slightly during this period. This suggests that black flight -- which has not been studied -- may also be a phenomenon in court-ordered desegregation, although its magnitude is very small compared to white flight.

Southern Districts. The demographic projection method has also been applied to southern districts with over 20 percent minority and available suburbs.[10] The results are quite similar to those for the north, although the average effects are somewhat larger.

Figure 4 summarizes the actual and projected loss rates for 14 southern districts. Since nearly all these districts began desegregation in 1970 or 1971, the before-desegregation rates are given by year, with those districts which began desegregation in 1970 excluded from the 1970 averages. Interestingly, anticipatory effects seem weaker in the south; this may be due in part to the fact that these were the earliest cases, when the concept of mandatory busing was in its infancy; persons may have been less aware of what to expect.

The effects after busing started, however, are stronger than in the north, with the actual loss rates rising to over five times the projected rate in the first year of busing. In the second to fifth years of busing the actual rate ranges from two to three times the projected rate. The elevation of the actual loss rate in the fourth year of desegregation is caused by major second-stage desegregation actions in three cities (Atlanta, Chattanooga, and Oklahoma City) which occurred coincidentally at this time.

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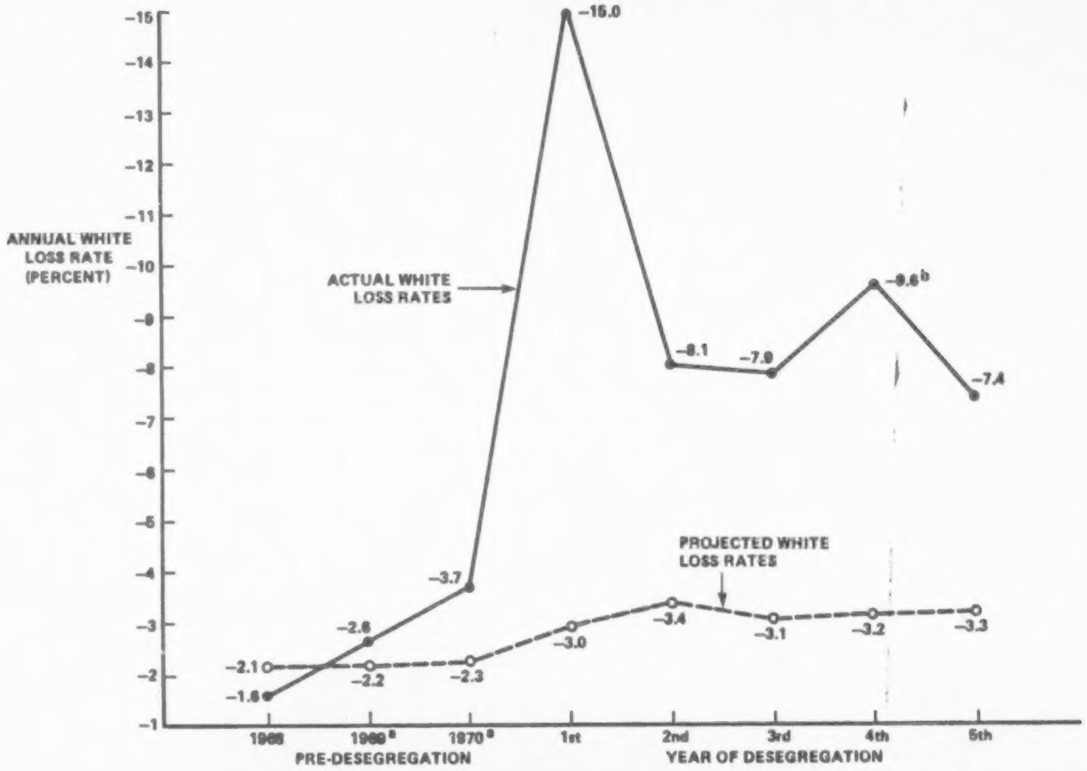
[10] Richmond and Norfolk, Virginia could not be analyzed due to annexations which could not be disentangled from enrollment changes.

FIGURE 4 – ACTUAL AND PROJECTED WHITE LOSS RATES FOR SOUTHERN SCHOOL DISTRICTS WITH COURT-ORDERED MANDATORY DESEGREGATION



[a] 1967 AND 1968 FOR OKLAHOMA CITY, WHICH STARTED DESEGREGATION IN 1969 AND 1971 AND 1972 FOR MEMPHIS, WHICH STARTED IN 1973.

[b] MAJOR DESEGREGATION ACTIONS IN OKLAHOMA CITY, BIRMINGHAM, AND ATLANTA.

It is noteworthy that, like the north, the projected loss rates do rise from the pre- to post-desegregation periods. The rates of white loss for the south are, however, smaller than for the north. This reflects the fact that most of these districts were gaining in school-age population in the 1950's, and out-migration levels in the 1960's were lower than in most northern cities.

District Variations. The previous discussion has presented average white flight effects for groups of school districts. The extent of variation in effects from one district to another can be examined in Table 2, which provides the actual and projected rates of white loss for each of the northern court-ordered cases.

First, it is noted that in the years prior to filing of lawsuits, all but two cases (San Francisco and Prince Georges County) have projected rates of changes that closely match the actual rate, thereby giving substantial evidence for the validity of the demographic technique being used here. San Francisco's projected losses exceed the actual, leading to the possibility that white flight in San Francisco is underestimated by the method. This is balanced to some extent by a possible overestimate in white flight for Prince Georges County, whose projected gain exceeds the actual gain prior to the lawsuit. As a conservative test of white flight effects, the last row in Table 2 shows average loss rates excluding Prince Georges County; the results are not substantially different.

Second, during the first year of desegregation all but one district--Springfield, Mass.-- show a white loss rate at least two and one-half times the projected rate, and five show accelerated losses on the order of 3 to 5 times the projected rates. In other words, the first year effects are both massive and consistent. Moreover, with the same exception, the long-term effects are also consistent, with actual 4th year losses ranging from 1-1/2 to 2 times the projected rates.

The sole exception to these strong white flight effects requires some explanation. One reason may be that in 1974 Springfield desegregated only five predominantly black elementary schools (out of 35) under court order, with a corresponding small involvement of the white student population. The secondary schools were already desegregated by 1970,

Table 2

ACTUAL AND PROJECTED WHITE LOSS RATES IN NORTHERN SCHOOL DISTRICTS WITH COURT-ORDERED MANDATORY DESEGREGATION[a]

		Two Years Before Suit	Year Before Suit	Year Before Order	Year Before Start	Year of Start	Years after Start 1st	2nd	3rd	4th	Retention Rate (R_{70})[b]
Boston	Actual	-4.2	-3.3	-6.6	--	1974	-14.9	-20.0	-11.3	- 9.8	.644
	Proj.	-3.2	-3.4	-3.7	--		- 4.1	- 3.8	- 4.8	- 5.9	
Denver	Actual	-1.1	-1.4	-2.3	-6.6	1974	-13.2	- 8.6	- 7.7	- 7.9	.636
	Proj.	--	-1.4	-2.0	-3.6		- 3.4	- 3.5	- 4.3	- 5.2	
Pasadena	Actual	-4.3	-5.2	-6.0	--	1970	-12.4	-11.5	-11.4	- 9.1	.638
	Proj.	--	-4.4	-4.7	--		- 5.1	- 5.4	- 5.4	- 5.0	
Pontiac	Actual	0.0	-1.4	+ .4	-5.9	1971	-18.0	- 2.6	- 4.4	- 4.6	.644
	Proj.	--	-2.1	-2.2	-2.0		- 2.3	- 2.7	- 2.6	- 2.8	
Springfield, Mass.	Actual	-4.7	-4.2	-4.2	-6.8	1974	- 6.6	- 3.4	- 3.9	- 5.0	.723
	Proj.	-3.0	-3.8	-4.4	-4.5		- 4.9	- 4.1	- 4.5	- 4.7	
Indianapolis[c]	Actual	+ .6	-2.0	-3.5	-6.7	1973	- 9.8	- 6.1	- 5.3	4.6	--
	Proj.	--	--	--	-2.8		- 2.9	- 3.0	- 3.1	- 3.2	
San Francisco	Actual	- .8[d]	-3.5[d]	--	-7.4	1971	-17.6	- 9.0	-12.9	-11.1	.478
	Proj.	--	-5.4	--	-6.0		- 6.5	- 6.3	- 6.0	- 5.9	
Detroit	Actual	-4.3	-6.1	-7.0	-9.5	1975-76[e]	-16.2	-21.5	-18.8		.591
	Proj.	-4.5	-4.8	-5.1	-6.5		- 6.0	- 6.3	- 6.8		
Prince Georges Co. (Washington, D.C. Suburb)[f]	Actual	+2.2	0	-3.3	-3.7	1973	- 9.4	- 5.9	- 6.5	- 8.2	1.00
	Proj.	+5.8	+4.0	+4.0	+3.8		+ 2.7	+ 2.0	+ .3	- .8	
AVERAGE WHITE LOSS RATE	Actual	-1.8	-3.0	-4.1	-6.7		-13.1	- 9.8	- 9.1	- 7.5	
	Proj.	-1.2	-2.5	-2.6	-3.1		- 3.6	- 3.7	- 4.2	- 4.2	
WHITE LOSS RATE, EXCLUDING PRINCE GEORGES	Actual	-2.4	-3.4	-4.2	-7.2		-13.6	-10.3	- 9.5	- 7.4	
	Proj.	-3.6	-3.6	-3.6	-4.2		- 4.4	- 4.4	- 4.7	- 4.7	

[a] All northern districts with enrollments over 20,000 and over 20% minority prior to desegregation that implemented court-ordered mandatory desegregation by 1975. See Appendix for raw data and calculations.

[b] Estimated 11-year net migration rate during the 1970's.

[c] Birth data not available; linear projection of 1967-1970 enrollment used.

[d] Years before board order of mandatory busing (1967 and 1968).

[e] Busing began in January, 1976.

[f] Three years before suit actual rate of gain is +5.2 and projected rate is +6.0.

largely due to school board actions under pressure from the Massachusetts State Board of Education.[11] Thus, pre-court order white losses might have been accelerated by secondary school desegregation, and post-order losses might be smaller than expected because of the small proportion of elementary schools affected by the plan. Of course, it is also possible that white flight has not occurred in Springfield, for reasons not fully understood at present.

Table 3 offers similar data for each of the southern districts. Again, the actual pre-desegregation loss rates in 1968 and 1969 either match or are exceeded by the projected rates in all but three cases. Oklahoma City, Little Rock and Birmingham have less projected than actual white losses during the 1967-69 period and thus may have somewhat overstated white flight effects. At the same time the method may be understating the white flight effects for Dallas, Forth Worth, and Greensboro.

It is quite apparent that, even though the average first-year effect in the South is larger than in the North, the South also has more variability. Dallas, Fort Worth, Houston, and Roanoke, Virginia, experienced only a doubling of the expected loss rates, while Jackson, Mississippi and Memphis, Tennessee experienced enormous loss rates of 40 percent during the first year of busing. One reason for the lower rates for the Texas and Virginia districts may be that they had very little white reassignment during their first year of desegregation. For example, in the first year of Dallas's court-ordered plan, only black students were bused; a reassignment order for majority-white schools was stayed. During this first year, Dallas's white loss was 9 percent compared to a projected loss of 4 percent. But when a grade 4 to 8 plan was implemented in 1976, which bused both black and white students, Dallas's white loss was nearly 13 percent compared to an expected loss of 3 percent. In contrast Roanoke, Virginia, implemented only satelliting and attendance zone revisions in 1971. Its loss rate was 6.6 percent compared to an expected 3.5 percent during the first year, but within three years the projected and actual rates

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[11] Massachusetts passed a racial balance act in 1965, which required all public schools to have no more than 50 percent minority enrollment. There was considerable controversy over confrontations between the Springfield School Committee and the State Board between 1966 and 1971, which included two threats by the State to withhold state funds for noncompliance with the law.

Table 3

ACTUAL AND PROJECTED WHITE LOSS RATES FOR SOUTHERN SCHOOL DISTRICTS

					Year of Start	Year of Desegregation					Retention Rate (R_{70})
		1968	1969	1970		1st	2nd	3rd	4th	5th	
Dallas	Actual	—	-0.8	-2.2	1971	-9.0	-9.3	-11.3	-8.8	-9.6	.86
	Proj.	-1.6	-2.5	-3.4		-4.0	-4.1	- 3.4	-3.1	-2.5	
Ft. Worth	Actual	+0.8	-1.0	-2.2	1971	-8.4	-5.0	- 9.0[a]	-7.0	-4.4	.76
	Proj.	-3.2	-3.6	-4.6		-5.3	-4.8	- 3.9	-4.0	-4.2	
Houston	Actual	-1.2	-5.1	-4.2	1971	-9.8	-8.6	-10.7	-4.9	-10.0	.67
	Proj.	-1.1	-2.1	-3.4		-4.2	-4.3	- 4.3	-2.2	-2.7	
Oklahoma City	Actual	—	1967 -1.4	1968 -1.6	1969	-8.6	-5.6	- 1.8	-14.8[a]	-11.3	.92
	Proj.		—	+0.4		-.1	-1.3	- 2.2	-2.4	-2.4	
Little Rock Arkansas	Actual	-0.8	-4.0	-2.9	1971	-10.4	-10.2	- 3.0	-6.0	-4.3	.89
	Proj.	+2.6	+2.0	+0.1		-0.5	-0.4	- 1.0	-1.9	-2.8	
Jackson Miss.	Actual	-3.1	-2.9	—	1970	-40.4	-7.5	- 8.8	-8.6	-9.2	.79
	Proj.	-2.3	-3.1	—		-4.2	-4.8	- 3.6	-2.6	-2.4	
Greensboro N.C.	Actual	+1.9	-0.3	-1.7	1971	-8.9	-8.9	- 3.2	-3.3	-3.0	.95
	Proj.	-2.0	-1.9	-2.9		-2.5	-1.6	- 0.5	-0.0	-0.5	
Raleigh N.C.	Actual	-1.7	—	+0.1	1971	-7.4	-7.4	- 5.1	-5.4	-4.0	.74
	Proj.	-1.7	-0.8	-1.4		-0.6	-2.0	- 1.3	-2.7	-2.5	
Roanoke Va.	Actual	—	-3.7	-3.8	1971	-6.6	-6.5	- 3.7	-4.8		.67
	Proj.	-1.4	-2.4	-3.1		-3.5	-4.0	- 4.4	-4.7		
Chattanooga Tenn.	Actual	-0.9	-2.6	-6.2	1971	-22.9	-11.4	-10.5	-20.1[a]	-8.4	.66
	Proj.	-3.2	-3.4	-4.5		-5.0	-5.1	- 4.3	-4.0	-5.8	
Nashville Tenn.	Actual	+0.2	+2.1	-1.3	1971	-10.5	-4.2	- 3.4	-3.4	-2.0	.88
	Proj.	+0.1	-0.1	-0.9		-1.4	-2.1	- 2.5	-2.3	-2.8	
Memphis	Actual	-1.9	1971 -5.6	1972 -14.2	1973	-41.4	-5.4	- 7.7			--
	Proj.	—	-1.5	-1.5		-1.5	-1.6	- 1.6			
Birmingham Ala.	Actual	-3.3	-3.9	--	1970	-10.0	-7.4	-10.2	-11.1	-7.2	.67
	Proj.	-1.0	-.9			-2.1	-3.3	- 3.3	-3.7	-3.7	
Atlanta Ga.	Actual	-8.1	-7.5	--	1970	-16.1	-16.1	-21.7	-26.2[a]	-19.5	.58
	Proj.	-7.6	-7.4			-7.8	-8.4	- 7.6	-7.6	-7.0	
AVERAGE WHITE LOSS	Actual	-1.6	-2.6	-3.7		-15.0	-8.1	- 7.9	-9.6	-7.4	
	Proj.	-2.2	-2.2	-2.3		-3.0	-3.4	- 3.1	-3.2	-3.3	

[a] Indicates that a major mandatory reassignment took place that year, either equalling or surpassing the initial reassignment.

[b] Because of pre-1970 annexations demographic projection cannot be used; projected rates are based on a linear projection of 1965 to 1968 enrollments (major annexations occurred in 1969 and 1970). Actual rates in 1973 to 1975 exclude additional annexations of the Raleigh area.

were nearly identical; no additional reassignments took place. It would appear, then, that the white flight effect is more heavily influenced by the amount of white student reassignment than by the amount of black student reassignment. This conclusion is amply supported by data from the Rossell II study (1977).

The long-term effects four or five years after the start of desegregation are also substantial in most cases, exceeding a factor of 1-1/2 for all districts except Roanoke and Nashville. Considering all 22 districts, then, all but three show substantial short- and long-term acceleration of white losses as a result of court-ordered mandatory desegregation.

Effects of Court Orders on Resegregation

The primary purpose of desegregation orders by courts has been to remedy illegal segregation existing within a school district. It has long been assumed by the courts that voluntary plans will not "work," in the sense of providing a sufficient degree of desegregation. Mandatory plans do, indeed, provide a greater amount of desegregation, at least initially. However, given the substantial accelerated white losses over a prolonged period, the possibility arises that mandatory plans ultimately fail because of resegregation. If so, the question arises whether voluntary plans might be more successful for intradistrict desegregation.

One of the difficulties in evaluating the extent of resegregation involves the definition of desegregation. If it means no more than ethnic or racial balance, then mandatory plans can always be successful, even if white flight causes a district's proportion white to drop to very low levels. As long as each school reflects the district ratio, even if the district is only 10 percent white, then a strict balance criteria would mean successful desegregation. However, neither the courts nor social scientists have ever held to such a standard of desegregation; rather, most definitions embody the concept of substantial opportunities for contact between minority and majority students. Therefore, if the proportion of white students in a district drops too low, then the district as a whole becomes either segregated or imbalanced compared to the ethnic composition of a region as a whole. If this condition is undesirable for individual schools, then it is certainly undesirable for an entire school district. Accordingly, to study resegregation we adopt measures of desegregation that reflect the absolute proportion of white students within each school in a district.

Before turning to such desegregation indices, Table 4 shows the total losses of white students attributable to court orders, along with the effect this has had on the overall percent white. The long-term impact of court orders is massive in 15 out of 23 districts, accounting for over half of all white losses over periods of at least seven years. In larger districts this translates into tens of thousands of students. In six other cases the effects have been substantial, accounting for nearly a third of all white losses. Only Springfield, Massachusetts and Fort Worth, Texas, have experienced insignificant losses attributable to court orders.

Of those districts that were majority white prior to the start of mandatory busing, most are now predominantly minority or fast approaching that status. Of these cases, the projected percent white shows that many would still be majority white or close to 50-50 including Boston, Denver, Pasadena, Pontiac, Dallas, Houston, Little Rock, Jackson, and Chattanooga, if the court order had not occurred. Of those districts that were predominantly minority prior to the start of the court case, the accelerated white loss has contributed to transforming most of them into virtually minority isolated school districts, including Detroit, San Francisco, Memphis, and Atlanta.

Another way to evaluate the effect of court orders on resegregation is by means of a desegregation index. The index chosen for use here is called an "exposure" index, which is the average percent white in schools attended by minority students (Coleman, et al., 1975).[12] ? If all minority students were distributed in a completely random fashion throughout most regions of the United States, and all schools

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[12] The index of dissimilarity and Coleman's relative exposure indices are not appropriate for measuring desegregation as defined here, since they can attain "perfect" scores of 0 when all schools are racially balanced, regardless of the actual exposure of minority to majority students.

TABLE 4

LONG-TERM EFFECTS OF COURT-ORDERED DESEGREGATION ON WHITE LOSSES

District	Total White Loss, Before Start to Present[a]	Percent of Loss due to Court Orders	Initial % White	Projected % White Without Court Orders	Present % White
North					
Boston	30,179	55	62	53	42
Denver	23,615	52	60	55	47
Pasadena	11,087	30	63	44	36
Pontiac	6,146	59	66	56	49
Springfield, Mass.	5,721	16	60	58	56
Indianapolis	22,562	51	64	61	55
San Francisco	24,429	29	40	30	22
Detroit	50,328	60	31	26	16
Prince Georges	48,820	100[b]	80	72	56
South					
Dallas	47,880	52	61	49	39
Ft. Worth	18,486	7	67	54	53
Houston	56,014	51	53	44	36
Oklahoma City	27,427	72	80	75	65
Little Rock	5,619	94	64	57	47
Jackson, Miss.	13,246	64	55	46	30
Greensboro, N.C.	5,908	52	68	63	58
Raleigh, N.C.	4,418	53	72	66	62
Roanoke, Va.	3,944	29	76	71	69
Chattanooga	8,114	44	52	46	33
Nashville	14,560	31	76	73	70
Memphis	40,882	54	47[c]	43	29
Birmingham	14,856	54	49	44	34
Atlanta	37,959	36	41	24	11

[a] In order to include anticipatory effects, "before start" means losses two years before actual implementation; "present" ranges from 1975 to 1977; depending on the districts (see Appendix for detailed data).

[b] Prince Georges County's projected enrollment is larger than the initial enrollment.

[c] In 1967, prior to annexations.

were desegregated, each school would be between 70 and 80 percent white, and thus each district would have an exposure index between 70 and 80.

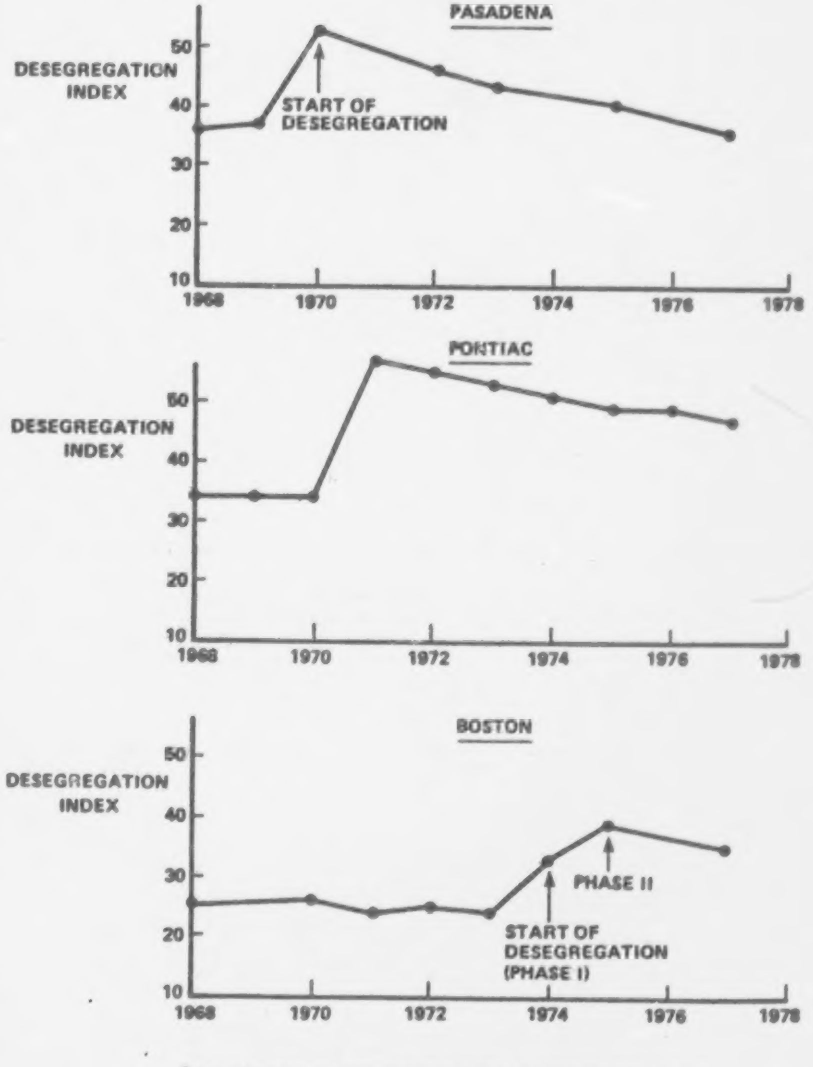
Figure 5 shows the trends in the amount of desegregation in those four northern school districts that have "tipped" as a result of court orders. The most interesting case is Pasadena, which had an index value of 37 the year before court-ordered desegregation. The success of the court's mandatory plan is seen in the first year of busing, when the index rose to 53. But because of white flight the index dropped to 35 by 1977, two points less than it was before desegregation. Although there was considerable ethnic imbalance in Pasadena in 1969, on the average the amount of minority exposure to white students was higher then than today in spite of a massive busing program.

The other three districts have not yet reached that point, but it is noteworthy that none of them have been able to maintain an index level over 50. In Boston the white flight has been so massive that even when Phase II was implemented the index reached only 39, and it has dropped sharply to 35 during the past two years. In spite of the strong court actions in Boston, this low degree of minority and white contact makes it hard to claim that its schools are desegregated today. The major social and political upheaval experienced by Boston seems a high price to pay for raising the percent white in the average black student's school by 10 points.

The trends in these four cities can be contrasted to San Diego, which has pursued a strictly voluntary plan. Although the percent white declined from 76 percent in 1968 to 64 in 1977, the demographic projections shown in the Appendix reveal that there has been no accelerated white flight. During this time the desegregation index has actually increased slightly to a high of 46 due to a vigorous voluntary program. Under court orders this plan will be expanded over the next four years, and the index is projected to increase by several points by the early 1980s. Of course, some minority students are relatively isolated while others are in schools ranging from 60 to 80 percent white. But by avoiding white flight (so far), San Diego has managed to offer desegregated education to about half of its minority students.

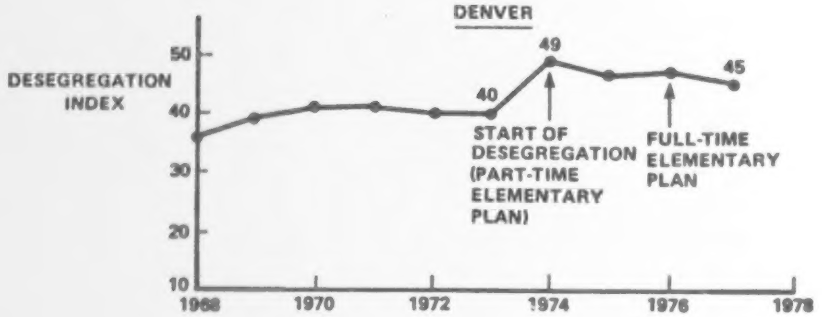
It is frequently overlooked that mandatory busing increases the desegregation experience of the isolated minority student only by

FIGURE 5 – CHANGES IN DESEGREGATION INDEX FOR SELECTED CITIES[a]

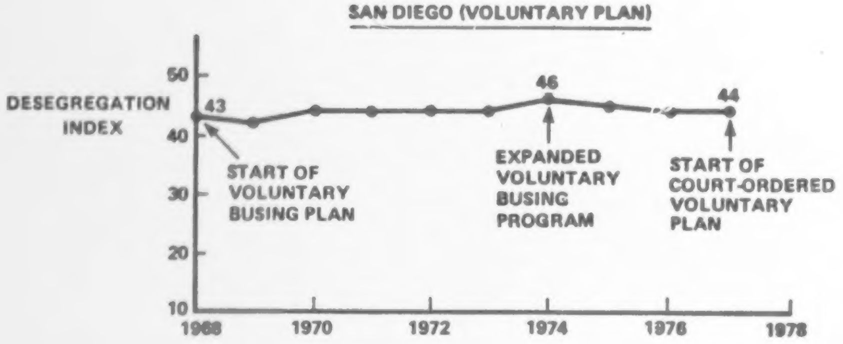


[a] DESEGREGATION INDEX IS THE AVERAGE PERCENT WHITE IN SCHOOLS ATTENDED BY MINORITY STUDENTS.

FIGURE 5 -- (con't)



DENVER



SAN DIEGO (VOLUNTARY PLAN)

decreasing the desegregation of other minorities. Then, after ethnic balance is attained, desegregation is decreased for all minority students by white losses, which are accelerated by white flight. When the percent white drops below 50 for the district as a whole, none of the minority students are truly desegregated. By contrast a voluntary plan can avoid white flight, thereby allowing a district to maintain its majority-white schools and offer desegregation to both resident minority students as well as to isolated minority students who transfer into these majority-white schools. Under such conditions, a voluntary plan like San Diego which desegregates a significant proportion of its minority students may well be considered more successful than a mandatory plan like Boston in which no minority students are desegregated.

Although not all the districts studied here have experienced the same degree of white flight as Boston, it is noteworthy that only four districts are now over 60 percent white, thereby providing for a substantial degree of desegregation. Five others are between 50 and 60 percent white, but the rate of white loss in these districts is such that most will probably "tip" within a few years. Even now some of these districts (e.g., Fort Worth, Springfield, and Indianapolis) have desegregation indices below 50. It seems clear, then, that nearly all school districts meeting the percent minority and suburban access criteria have experienced sufficient court-induced white flight to be in clear danger of resegregating.

Metropolitan Plans: Jefferson County

The existence of white flight in central city school districts has led some policy analysts to conclude that desegregation should be carried out on a metropolitan basis. A metropolitan plan combines central-city and suburban school districts and, if mandatory, exchanges inner-city minority students with suburban white students. Many advocates of mandatory metropolitan plans believe that eliminating the possibility of suburban relocation largely solves the white flight problem. Moreover, for those school districts that already have predominately minority enrollments, a metropolitan plan of some type -- either mandatory or voluntary -- may be the only recourse for desegregation.

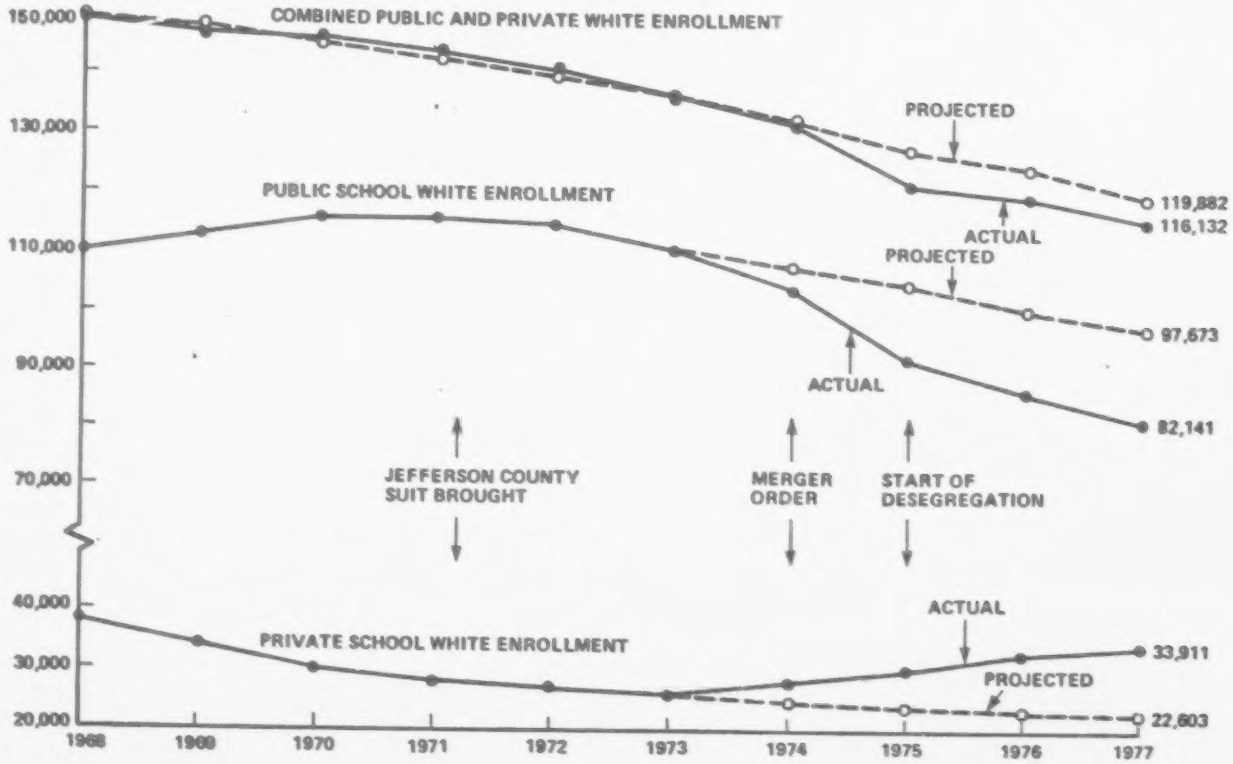
Unfortunately, the evidence is not yet complete for evaluating white flight in mandatory metropolitan plans. It might be argued that the county-wide school districts without suburbs shown in Table 1 can be used for this purpose. However, generalization from these districts to true metropolitan plans -- such as those proposed for Detroit or Atlanta -- presents several hazards. First, the Florida districts, which do show very little white flight, are unique because all counties came under court orders, so that white flight could occur only if persons left the state or enrolled in private schools. Second, all of the other cases (except Louisville) involve a single county-wide school district and all are in relatively rural regions of the South, where mobility may be constrained. Even so, the quasi-experimental analysis shows that some of these districts appear to have experienced white flight.

The fact is that the Supreme Court has imposed stringent requirements for metropolitan remedies, and as a result only two large-scale plans have been approved to date. One is Wilmington, Delaware and the other is Louisville, Kentucky, but only the latter has been implemented. Furthermore the Louisville plan, involving a merger of Louisville with the surrounding Jefferson County school district, might be debatable as a metropolitan case since it excludes several suburban school districts in Indiana located immediately across the Ohio River from Louisville. Nonetheless, the Jefferson County-Louisville desegregation plan comes closest to a true mandatory metropolitan plan of any implemented so far, and therefore its outcome is of considerable interest for clues about metropolitan white flight.

The existence of a comprehensive study of enrollment trends in Jefferson County (Johnson, et al. 1977), which documents both public and private white enrollment data from 1968 to 1977, can improve the projection analysis. The private school data enables a unique examination of the relationship between public and private school enrollments during court-ordered desegregation, an issue that may be especially important for metropolitan plans.

Actual and projected white enrollments for Jefferson County are shown in Figure 6 (see Appendix for detailed data). The uppermost solid line is the actual combined public and private enrollment for grades 1-12. Since our demographic technique projects the total

FIGURE 6 – PROJECTED AND ACTUAL WHITE SCHOOL ENROLLMENTS FOR THE LOUISVILLE-JEFFERSON COUNTY DISTRICT, 1968-1977



school-age population, it is most appropriately applied to this combined enrollment; the projected enrollment is shown by the uppermost dashed line. It is clear that the actual and projected enrollments are extremely close between 1969 and 1974, the year before desegregation began, thereby again supporting the validity of the projection method. In 1975, the first year of desegregation, the actual loss rate jumps to 7.1 percent while the projected rate is 3 percent, yielding an excess loss of nearly 6,000 white students. Not all of this loss appears to be due to relocation, however, since during the next two years the actual loss rate is smaller than the projected rate. By 1977 the excess loss is reduced to about 3,000 students; this suggests that during the first year of desegregation several thousand students were kept out of school.

The actual and projected public and private school enrollments are shown by the two lower sets of lines. Between 1968 and 1971 there appears to have been a general transfer taking place from private to public schools, so that the public schools were actually gaining white enrollment even though the school-age population was declining. This gain clearly came from private schools, since they were declining more rapidly than the school-age population. For this reason the separate demographic projections for private and public schools have been applied starting in 1973 when both public and private enrollments begin to match the total school-age trend. The projected loss rates used are those for the total school-age population, which of course assumes that both private and public schools would have continued to lose students at the same rate. This is a refinement of the projection method which can be applied only when private school enrollments are available. Similar transfer patterns between public and private schools in the late 1960's could explain why the projected losses are higher than actual losses for several cities described in previous tables.

After some anticipatory white loss in 1974, there is a very substantial public school loss of 11.3 percent in 1975 when busing began, which is more than 3-1/2 times the projected rate of 3 percent. The next two years the actual loss rate is between 1-1/2 to 2 times higher than the projected rate. Thus the first-year white flight effect in Jefferson County is comparable to what we have found for central-city districts, but the longer-term effect is not quite as strong. This demonstrates that mandatory metropolitan plans can indeed have white flight, but perhaps with somewhat weaker long-term effects.

What is equally interesting about these results is the amount of flight due to relocation (or failure to move in) versus the amount due to transfers to private schools. By 1977 the excess white loss in Jefferson County public schools due tc the court order was about 15,500 students. The excess increase in private schools, over and above their projected white enrollment, is about 11,000. Therefore, it appears that most of the white flight in Jefferson County is in the form of private school transfers; only about one-third of the loss is attributable to relocation.

These results reveal that significant white flight is possible in metropolitan plans, although, if Jefferson County is any indication, it may take the form of transfers to private schools. However, perhaps because of the expense and availability of private schools, the long-term white flight effects in metropolitan plans may be smaller than for central-city districts.

DISCUSSION

Summary of Findings

The findings of Coleman, the latest Farley and Rossell studies, and the present study all agree on one important fact. Desegregation can cause accelerated white flight, particularly in larger school districts with substantial minority enrollments (over 20 percent or so) and in districts with accessible white suburbs. This conclusion is robust, based on a concensus from four different studies employing different conceptual and analytic strategies.

Rossell's latest study and the present study clarify certain aspects of the white flight effect. The effect tends to happen only when significant numbers of students are mandatorily reassigned (or "bused"), and especially when white students are reassigned to formerly minority schools. This situation develops mostly in court-ordered cases, although there are several mandatory HEW-ordered plans and at least one case of a community-initiated mandatory plan.[13] Therefore court-ordered mandatory plans, rather than desegregation per se, have been the primary causes of accelerated white flight in desegregating school districts. Voluntary busing plans such as that adopted by San Diego do not appear to have any significant effect on white flight.

Using demographic projection methods, the present study offers further information about white flight induced by court-ordered desegregation. The effect is strongest in the first year of desegregation, with average white losses accelerating by factors of 2 to 4 in most cases. But the projections also show that many districts suffer anticipatory white losses, usually between the initial legal activities and the actual start of desegregation. More important, the method also shows that in most districts the accelerated white losses last for prolonged periods up to four or five years or more. Sometimes these longer-term effects are boosted by subsequent court actions taken to broaden desegregation.

The longer-term effects are stronger in larger central-city school districts that have ample two-way busing, available suburbs, and higher minority concentrations. In some of these cases the court action seems to have permanently altered the rate of white decline in the public schools.

It is important to stress that not all white losses are attributable to the court actions. Many districts, especially those in the larger urban areas, would have experienced substantial white declines during the 1970's without the court orders. Most of these "natural" declines are due to a demographic transition characterized by declining white births combined with increasing central-city white outmigration rates. Nonetheless, the extra white losses caused by court-ordered mandatory desegregation are very substantial, in most cases amounting to over half of all white losses over periods of six to eight years.

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[13] Berkeley, California is the only city meeting our size and percent minority criteria which has voluntarily implemented a comprehensive two-way busing plan, although Seattle, Washington, has proposed to do so in the Fall of 1978.

White flight appears to be insignificant in most Florida districts and in districts with small concentrations of minority students. The latter cases are apparently explained by the relatively minor dislocation necessary for desegregating relatively small numbers of minority students. In other county-wide districts without suburbs -- which might be considered "metropolitan" -- court orders have induced white flight, but the effect may not be long-term like that in central city districts. According to the Louisville-Jefferson County experience, the reason may have to do with cost and availability of private schools, which logically forms the primary avenue for white flight in metropolitan plans. Of course, should the supply of private schools be increased, as it might with tuition tax credits or with property tax cuts such as those occurring in California, metropolitan plans could rival intra-district plans in white flight.

The Future of School Desegregation

Having provided further evidence that court-ordered desegregation does cause white flight, and that under certain conditions the effect is very substantial, it must be conceded that the present study will probably not end the debate. All projection studies must make assumptions, and while the assumptions adopted here seem reasonable, they can be challenged. Moreover, at least one other recent study using different methods has argued that long-term effects are rare (Rossell, 1978). As a result, it is likely that there will be continuing argument, not over the existence of court-induced white flight, but over its full magnitude.

Nonetheless, this argument should not be allowed to obscure the central policy issue. Most of the school districts studied here are losing whites at a rapid rate. While part of the cause may be demographic, the court action only increases the rate of loss and increases the risk of resegregation. For persons who sincerely desire to increase the total amount of integration, this risk has to be disturbing. At precisely a time when policies are needed to halt or reverse the normal white declines in urban areas, we have instead court actions which are exacerbating the condition. Although the effects may be relatively

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small in some cases, in other cases they are large. In either case they seem inappropriate during an era when most urban experts are urgently seeking ways to attract whites back into cities. Clearly, other remedies for school desegregation should be considered.

One alternative, of course, is to abandon "induced" school desegregation policies entirely, and let school desegregation take place "naturally" by housing choices of white and minority families. Given the failure to document definitive and meaningful educational and social benefits from induced school desegregation policies (Armor, 1972; St. John, 1975), we may eventually discover that natural desegregation is the wisest policy.

However, given current knowledge about housing segregation, which appears to be increasing in many metropolitan areas, many educational policy makers will not be content with the amount of desegregation arising naturally from neighborhood school assignments. Accordingly, for many policy makers there are only two meaningful alternatives: expanded voluntary plans, either on an intradistrict or metropolitan basis, or mandatory metropolitan plans.

In evaluating the relative merits of these two options, it is essential to gain some understanding of the reasons for white flight. If we are to improve upon present policies, so that the participants do not undermine and ultimately defeat the goal of desegregation, we must learn more about why whites oppose mandatory desegregation and how strong these feelings are. Obviously, it is beyond the scope of this paper to present an in-depth study of this issue. But it is possible to offer some helpful insights from attitudinal studies of busing which complement the behavioral findings already presented.

Most national public opinion polls have shown that whites are strongly opposed to busing for the purpose of desegregation (on the order of 75 to 85 percent), a stance that has changed little in spite of the increasingly commonplace status of busing during this decade (Weidman, 1975). Similar results have been found in recent special surveys in Los Angeles, San Diego, and Wilmington, Delaware, all of which are involved in court desegregation cases (Armor, 1977; Kaplan, 1977). Thus attitudinal opposition to busing is consistent, in the aggregate, with the behavioral white flight phenomenon.

Yet these same surveys document substantial white support for the concept of integrated schools, and there is little opposition among whites to the prospect of minority children coming into their children's present schools. In the Los Angeles survey, 87 percent of white parents said they would not object if their child attended a school that was one-third black and two-thirds white, and 74 percent would not object if minority students were bused into their child's present school "in large numbers" (18 percent objected). Again, the behavioral evidence in white flight studies validates these attitudinal findings. Many school districts, including Los Angeles and San Diego, have promoted voluntary busing programs that have brought large numbers of minority students into schools that were formerly nearly all white. Yet little or no white flight has been observed as a result of these voluntary programs.

Contrary to the suggestions of some policy commentators, these results are not consistent with the thesis that opposition to busing and white flight are latent forms of prejudice and racism. Of course, prejudice and racism do exist, and undoubtedly persons with such attitudes are among the first to flee a desegregation program. But racism as an explanatory factor is not alone sufficient to account for the fact that the vast majority of whites accept desegregated schools when brought about by voluntary methods but reject them when their children are mandatarily bused or reassigned to schools outside their neighborhoods. The conclusion that racism is not the explanation is also supported by special analyses of the NORC 1974 survey, which found that whites with low racial prejudice scores were nearly as opposed to busing as persons with high prejudice (82 percent and 88 percent, respectively; Weidman, 1975).

If racism does not explain white flight, what does? The Los Angeles survey offers two further clues which support a different explanation. First, when asked about their reasons for opposing busing, the majority of whites mentioned a belief in the neighborhood school or related issues such as distance, loss of choice, lost time, and lost friends. Second, when asked about the benefits and harms of desegregation, a large majority of white parents believed it would improve neither minority education nor race relations, while it would increase discipline problems and racial tensions. A majority of black parents believed the opposite, while Mexican-American parents were in between. Thus most white parents believe they are being forced to give up something they value -- the neighborhood school -- in return for a policy that benefits no one and may even be harmful. Given the strength of these feelings, and their persistence over time, it is quite possible that we have underestimated the depth of belief in and commitment to the neighborhood school.

This substantial public opposition to mandatory busing makes it unlikely that legislative bodies, whether state or federal, will enact mandatory metropolitan desegregation. Realistically, the only hope for mandatory metropolitan plans rests upon further court action. Before federal courts can order metropolitan remedies, however, they must show that suburban school districts have had a direct and substantial effect on the central-city's school segregation. At present, this has been found for Wilmington, Delaware and may yet be found for Indianapolis, both for quite special reasons.[14] As was true for Detroit, however, it will be difficult to show such connections in most cities. The NAACP and the ACLU are pursuing metropolitan remedies in Cincinnati and Atlanta on the grounds of government-caused housing segregation, but it is an open question whether federal courts will agree with this allegation.

An important exception may be California, whose school desegregation cases are being handled in state courts under the State Supreme Court edict that all school segregation is unconstitutional regardless of its causes. There is nothing in the logic of the state court's holdings that would preclude a judge from ordering a metropolitan remedy. Given the strong majority opposition to busing, however, and the inevitable legal and political battles that will ensue, it is unclear whether any court will try to do so. For example, if any school district needs a metropolitan remedy it is Los Angeles, where the Anglo enrollment is already down to 35 percent. The projected Anglo losses under busing are likely to turn Los Angeles into a minority-isolated district by 1980 or so, where few minority children will attend desegregated schools (Armor, 1977). Yet, the court is allowing an intradistrict plan to start and has given no indication it will expand it into a metropolitan plan.

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[14] Wilmington's metropolitan remedy was imposed because of a state law which specifically prevented the largely black Wilmington School District from annexing suburban districts. Indianapolis may get a metropolitan remedy because of state actions that created a metropolitan local government but which kept the school district intact. The Louisville-Jefferson County merger was first ordered by an Appellate Court but was actually implemented by the State Board of Education after the Supreme Court disapproved the appellate order.

Even if the courts were to order metropolitan mandatory desegregation, there is no guarantee of success. The experience of Jefferson County, Kentucky, shows that white flight can occur in a metropolitan plan, albeit via transfers to private schools. The current dissatisfactions with public education coupled with growing pressure for California-style property tax cuts could lead to an upturn in private school resources. Property tax cuts can accelerate the trend with a two-pronged affect: they make it harder for public schools to deliver services, while at the same time increasing a family's ability to pay for private schooling. Tuition tax credits now being considered by Congress will have a similar affect. In this context, a court order of metropolitan busing could deliver a devastating blow to public education.

If the courts fail to order metropolitan desegregation, then voluntary plans will be the only remaining alternative, possibly on a metropolitan basis if state or federal funds become available. Although voluntary plans are widely believed to be ineffective, we have shown that San Diego's voluntary plan has maintained a substantial degree of desegregation, surpassing the amount of desegregation offered by the celebrated mandatory plans in Pasadena, Denver and Boston. Although we cannot generalize from the success of a single city, the fact remains that in recent times the voluntary approach has not led to the intense controversy observed in mandatory busing cases. Perhaps we have not given voluntary methods a fair trial. If other school districts can duplicate San Diego's experience, voluntary plans would provide desegregation for a large fraction of minority students, perhaps for those who could benefit most.

Most important, a voluntary program eliminates the inevitable social costs of programs which are forced upon an unwilling and protesting public. Aside from the direct costs in the form of white flight, it is quite possible that mandatory busing has already added to the erosion of confidence in public education. Indeed, recent Gallup polls show that integration/busing is named as the number two problem facing public education (AIPO, 1978). Given this climate of opinion, voluntary desegregation programs not only offer more enrollment stability; they may also help to stop this unfortunate decline in support for the public schools.

APPENDIX

The tables in the following pages present raw data and calculations for the demographic projections of the school-age population in each school district in the study. All birth data, except as otherwise noted, are live births by place of residence from *Vital Statistics of the United States*, National Center for Health Statistics. School data are fall enrollments from the Office of Civil Rights, HEW, racial and ethnic census reports, unless otherwise noted. The court actions are taken from written decisions and school district interviews.

The last table in the appendix is adapted from the Rossell Study (Rossell, 1977).

WHITE ENROLLMENT PROJECTIONS FOR BOSTON, MASSACHUSETTS 1968-1977

Year	White Births	Retention Rate (R)	Net
1950	15076	.64370	9704
1951	(15018)[a]	.64370	9666
1952	(14960)[a]	.64370	9630
1953	(14902)[a]	.64370	9592
1954	(14844)[a]	.64370	9555
1955	14787	.64370	9518
1956	(14411)[a]	.64370	9276
1957	(14164)[a]	.64370	9117
1958	(13857)[a]	.64370	8920
1959	(13550)[a]	.64370	8722
1960	13244	.64370	8525
1961	13158	.64370	8470
1962	11990	.64370	7718
1963	11726	.64370	7548
1964	11788	.64370	7588
1965	10178	.64370	6552
1966	9382	.64370	6039
1967	9082	.64370	5846
1968	8746	.64370	5630
1969	8082	.64370	5202
1970	8446	.64370	5437
1971	6952	.64370	4475
1972	5788	.64370	3726

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12	Actual Loss Rate	Percent White	Minority
1966							66425[b]			
1967				118413		65378	65378[b]	-1.6%	70.5%	25466
1968	9704	7548	2156	116257	-1.8%	64201	64500	-1.3%	68.5%	29674
1969	9666	7588	2078	114179	-1.8%	63046	62657	-2.9%	66.0%	32230
1970	9630	6552	3078	111101	-2.7%	61343	62014	-1.0%	64.0%	34680
1971	9592	6039	3553	107548	-3.2%	59380	59390	-4.2%	61.5%	37192
1972	9555	5846	3709	103839	-3.4%	57361	57405	-3.3%	59.5%	38722
1973	9518	5630	3888	99951	-3.7%	55239	53593	-6.6%	57.2%	40054
1974	9276	5202	4074	95877	-4.1%	52974	45624	-14.9%	52.4%	40889
1975	9117	5437	3680	92197	-3.8%	50961	36522	-20.0%	47.4%	40217
1976	8920	4475	4445	87752	-4.8%	48515	32393	-11.3%	44.4%	40613
1977	8722	3726	4996	82756	-5.7%	45750	29211	-9.8%	41.6%	40981

WHITES, U. S. CENSUS

	<5	10-14		10 Year Retention	11 Year Retention
1950	66496	46179	R_{50}	=.67	.64370
1960	56346	44796	R_{60}	=.67	.64370
1970	35212	38179	R_{70}	.67	.64370

COURT ACTIONS (Morgan v. Kerrigan)

1973	Suit brought.
1974	First order and start of desegregation (Phase I).
1975	Final plan (Phase II).

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[a] Interpolated.

[b] District white figures included American Indian and Asian based on 1968-70 enrollments for these groups; 1625 and 1650, respectively, have been subtracted.

ANGLO ENROLLMENT PROJECTIONS FOR DENVER, 1968-1977

Year	White Births	Anglo Fraction	Retention Rate (R)	Cohort Net	Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12	Actual Loss Rate	Percent Anglo	Min.
1950	9745	.810	.695	5486	1966							64955		68.0%	31003
1951	(9845)[a]	.817	.689	5542	1967				70564		64226	64226	-1.1%	66.6%	32194
1952	(9845)[a]	.814	.683	5494	1968	5486	4496	990	69574	-1.4%	63327	63398	-1.4%	65.6%	33179
1953	10045	.811	.677	5515	1969	5542	4127	1415	68159	-2.0%	62060	61912	-2.3%	64.1%	34722
1954	10145	.808	.671	5500	1970	5515	3505	2010	66149	-2.9%	60261	59716	-3.5%	62.1%	36372
1955	10245	.805	.665	5484	1971	5500	3248	2252	63897	-3.4%	58212	57177	-4.3%	60.3%	37661
1956	10345	.802	.659	5468	1972	5468	3223	2245	61652	-3.5%	56174	53420	-6.6%	58.3%	38196
1957	10445	.799	.653	5450	1973	5450	3245	2205	59447	-3.5%	54512	49892	-6.6%	57.0%	37728
1958	10545	.796	.647	5431	1974	5431	3421	2010	57437	-3.4%	52311	42838	-13.2%	53.8%	36832
1959	10645	.783	.641	5343	1975	5343	3324	2019	55418	-3.5%	50480	39519	-8.6%	50.4%	38803
1960	10730	.790	.636	5391	1976	5391	3015[b]	2376	53042	-4.3%[b]	48309	36460	-7.7%	48.8%	38218
1961	11074	.778	.630	5428	1977	5428	2668[b]	2760	50282	-5.2%[b]	45797	33562	-7.9%	47.0%	37904
1962	10328	.766	.624	4937											
1963	9632	.754	.619	4496											
1964	9074	.742	.613	4127											
1965	7910	.730	.607	3505											
1966	7528	.718	.601	3248											
1967	7673	.706	.595	3223											
1968	7926	.694	.590	3245											
1969	8590	.682	.584	3421											
1970	8584	.670	.578	3324											
1971	8012[b]	.658	.572	3015											
1972	7298[b]	.646	.566	2668											

	WHITES, U.S. CENSUS			ANGLOS				
	<5	10-14	% Anglo	<5	10-14		10 Year Retention	11 Year Retention
1950	51343	28412	.81	41588	23014	R_{50}	.718	.695
1960	48194	37805	.79	38073	29866	R_{60}	.663	.636
1970	35852	37682	.67	24021	25247	R_{70}	.608	.578

[a] Interpolated.

[b] Potential effect of 1970-71 court actions on births.

[c] From Denver Public School Ethnic Distribution Reports.

COURT ACTIONS (Keyes v. School District)

1969	Suit brought; Park Hills area desegregated.
1970	First order of general desegregation.
1973	Supreme Court affirmed.
1974	Start of desegregation; part-time elementary plan.
1976	Full time elementary plan.

ANGLO ENROLLMENT PROJECTIONS FOR PASADENA, CALIFORNIA 1968-1977

Year	White Births	Anglo Fraction	Retention Rate (R)	Cohort Net
1950	1721	.97	.959	1601
1951	(1706)[b]	.968	.927	1531
1952	(1690)[b]	.966	.895	1461
1953	1674	.964	.863	1393
1954	1659	.962	.831	1326
1955	1644	.96	.799	1261
1956	1638	.958	.767	1204
1957	1622	.956	.735	1140
1958	1607	.954	.703	1078
1959	1582	.952	.671	1011
1960	1566	.95	.638	949
1961	1516	.93	.638	900
1962	1554	.91	.638	902
1963	1596	.89	.638	906
1964	1476	.87	.638	819
1965	1330	.85	.638	721
1966	1240	.83	.638	657
1967	1224	.81	.638	633
1968	1300	.79	.638	655
1969	1358	.77	.638	667
1970	1448	.75	.638	693
1971	1118[c]	.73	.638	521
1972	989[c]	.71	.638	448

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12[a]	Actual Loss Rate	Percent Anglo	Minority
1966							20958		65.6	11019
1967				15757		20049	20049	-4.3%	63.1	11731
1968	1601	906	695	15062	-4.4%	19167	19008	-5.2%	60.4	12476
1969	1531	819	712	14350	-4.7%	18266	17859	-6.0%	58.3	12763
1970	1461	721	740	13610	-5.1%	17334	15647	-12.4%	53.7	13476
1971	1393	657	736	12874	-5.4%	16398	13848	-11.5%	50.3	13699
1972	1326	633	693	12181	-5.4%	15513	12271	-11.4%	46.8	13954
1973	1261	655	606	11575	-5.0%	14737	11188	-9.1%	44.0	14226
1974	1204	667	537	11038	-4.6%	14059	10970	-1.9%	42.2	15084
1975	1078	693	385	10653	-3.5%	13567	10664	-2.8%	40.9	15419
1976	1011	521[c]	490[c]	10163	-4.6%[c]	12943	9839	-7.7%	38.3	15879
1977	949	448[c]	501[c]	9662	-4.9%[c]	12309	8962	-8.9%	36.3	15771

	WHITES, U.S. CENSUS		ANGLO				10 Year Retention	11 Year Retention
	<5	10-14	Percent Anglo	<5	10-14			
1950	6421	4250	.97	6228	4122	R_{50}	.963	.959
1960	6854	6315	.95	6511	5999	R_{60}	.665	.638
1970	5549	5769	.75	4162	4327	R_{70}	.665	.638

[a] From "Racial and Ethnic Distribution of Enrollments," Pasadena schools.

[b] Interpolated.

[c] Potential effect of start of desegregation (1970) on birth rates.

COURT ACTIONS (Spangler v. Pasadena)

1969	Suit brought.
1970	Order and start of general desegregation.

WHITE ENROLLMENT PROJECTIONS FOR PONTIAC, MICHIGAN 1968-1977

Year	White Births	Retention Rate (R)	Net	Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12[a]	Actual Loss Rate	Percent White	Minority
1950	1918	.832	1596	1966							16071		68.6%	7363
1951	(1938)[b]	.813	1576	1967				19409		16074	16074	0.0%	67.6%	7695
1952	(1968)[b]	.794	1563	1968	1596	1188	408	19001	-2.1%	15736	15845	-1.4%	66.3%	8043
1953	1998	.775	1548	1969	1576	1167	409	18592	-2.2%	15390	15915	+0.4%	64.8%	8603
1954	2127	.756	1608	1970	1563	1193	370	18222	-2.0%	15082	14977	-5.9%	62.2%	9100
1955	2162	.737	1593	1971	1548	1130	418	17304	-2.3%	14736	12277	-18.0%	56.8%	9358
1956	2350	.718	1687	1972	1608	1130	478	17326	-2.7%	14338	11953	-2.6%	56.4%	9212
1957	2259	.699	1579	1973	1593	1136	457	16869	-2.6%	13965	11422	-4.4%	53.6%	9754
1958	2189	.680	1489	1974	1687	1221	466	16403	-2.8%	13574	10899	-4.6%	52.1%	9900
1959	2009	.661	1328	1975	1579	1278	301	16102	-1.8%	13330	10652	-2.3%	51.5%	10206
1960	2098	.644	1351	1976	1489	1145[c]	344	15758	-2.1%[c]	13050	10358	-2.8%	50.4%	10416
1961	2048	.644	1319	1977	1328	985[c]	343	15415	-2.2%[c]	13343	9699	-6.4%	48.8%	10408
1962	1820	.644	1172											
1963	1844	.644	1188											
1964	1812	.644	1167											
1965	1852	.644	1193											
1966	1754	.644	1130											
1967	1755	.644	1130											
1968	1764	.644	1136											
1969	1896	.644	1221											
1970	1984	.644	1278											
1971	1778[c]	.644	1145											
1972	1530[c]	.644	985											

WHITES, U.S. CENSUS

	<5	10-14		10 Year Retention	11 Year Retention
1950	6704	4668	R_{50}	.846	.832
1960	8015	5672	R_{60}	.670	.644
1970	6864	5371	R_{70}	.670	.644

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[a] Supplied by Pontiac School District. Includes less than 1% minorities other than black and Hispanic for consistency with early data; 1975-77 excludes County Special Education Centers which were excluded in earlier years.

[b] Interpolated.

[c] Possible effect of desegregation.

COURT ACTIONS (Davis v. School District

1969	Suit brought.
1970	First order.
1971	Affirmed; start of general desegregation.

WHITE ENROLLMENT PROJECTIONS FOR SPRINGFIELD, MASSACHUSETTS 1968-1977

Year	White Births	Retention Rate (R)	Net	Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12	Actual Loss Rate	Percent White	Minority
1950	3427	.888	3043	1966							25808			
1951	(3491)[a]	.872	3044	1967				37109		24606	24606	-4.7%	77.7%	7062
1952	(3553)[a]	.855	3038	1968	3043	2273	770	36339	-2.1%	24089	24222	-1.6%	76.4%	7478
1953	3614	.838	3029	1969	3044	2140	904	35435	-2.5%	23487	23604	-2.6%	74.5%	8067
1954	3674	.822	3020	1970	3038	1964	1074	34361	-3.0%	22784	22501	-4.7%	71.8%	8845
1955	3743	.806	3017	1971	3029	1710	1319	33042	-3.8%	21917	21547	-4.2%	69.6%	9407
1956	3726	.789	2940	1972	3020	1560	1460	31582	-4.4%	20952	20631	-4.2%	67.6%	9866
1957	3710	.772	2864	1973	3017	1582	1435	30147	-4.5%	20010	19220	-6.8%	64.9%	10408
1958	3702	.756	2799	1974	2940	1463	1477	28670	-4.9%	19029	17946	-6.6%	62.4%	10821
1959	3676	.740	2720	1975	2864	1680	1184	27486	-4.1%	18248	17327	-3.4%	60.1%	11512
1960	3658	.723	2645	1976	2799	1560	1239	26247	-4.5%	17609	16656	-3.9%	58.9%	11633
1961	3570	.723	2581	1977	2720	1490	1230	25017	-4.7%	16746	15826	-5.0%	56.5%	12206
1962	3276	.723	2369											
1963	3144	.723	2273											
1964	2960	.723	2140											
1965	2717	.723	1964											
1966	2365	.723	1710											
1967	2158	.723	1560											
1968	2188	.723	1582											
1969	2024	.723	1463											
1970	2324	.723	1680											
1971	2157	.723	1560											
1972	2061(est)	.723	1490											

WHITES, U. S. CENSUS

	<5	10-14		10 Year Retention	11 Year Retention
1950	14816	8527	R_{50}	.898	.888
1960	17134	13303	R_{60}	.745	.723
1970	10740	12764	R_{70}	.745	.723

[a] Interpolated.

COURT ACTIONS (School Committee v. School Board--state)

1967-69	Secondary school desegregation mandated by State Board.
1970	State Board voted to withhold funds.
1971	Suit brought.
1972	First order (Sept. 1973 start ordered).
1974	Start of elementary desegregation.

WHITE ENROLLMENT PROJECTIONS FOR INDIANAPOLIS, 1968-1976

Year	Actual K-12	Actual Loss Rate	Projected Loss Rate[a]	Projected K-12	Minority	Percent White
1967	73449				35700	67.3%
1968	72010	-2.0%			36577	66.3%
1969	70204	-2.5%			37988	64.9%
1970	67772	-3.5%		67772	38044	64.1%
1971	63334	-6.6%	-2.7%	66150	38992	61.9%
1972	59079	-6.7%	-2,8%	64266	38522	60.5%
1973	53292	-9.8%	-2.9%	62382	38422	58.1%
1974	50041	-6.1%	-3.0%	60498	37550	57.1%
1975	47390	-5.3%	-3.1%	58615	37235	56.0%
1976	45210	-4.6%	-3.2%	56731	36815	55.1%

[a] Based on linear regression of 1967 to 1970 actual enrollment;
slope = -1884, constant = 75568

COURT ACTIONS (U.S. v. Board of School Comm.)

1968	Suit brought.
1971	First order.
1973	Start of "interim" plan (partial desegregation).
1973	Metro order; not yet decided.

WHITE ENROLLMENT PROJECTIONS FOR SAN FRANCISCO, CALIFORNIA 1968-1977

Year	White Births	Anglo Fraction	Retention Rate (R)	Cohort Net
1950	12782	.880	.575	6468
1951	(12621)[b]	.872	.562	6185
1952	(12460)[b]	.864	.549	5910
1953	12298	.856	.536	5642
1954	11842	.848	.523	5252
1955	11132	.840	.510	4769
1956	10902	.832	.496	4499
1957	11366	.824	.483	4524
1958	11082	.816	.470	4250
1959	10498	.808	.457	3876
1960	10476	.800	.444	3721
1961	10418	.782	.444	3617
1962	9974	.764	.444	3383
1963	9462	.746	.444	3134
1964	9082	.728	.444	2936
1965	8224	.710	.444	2593
1966	7322	.692	.444	2250
1967	7310	.674	.444	2188
1968	6966	.656	.444	2029
1969	6894	.638	.444	1953
1970	6492[c]	.620	.444	1787
1971	5684[c]	.602	.444	1519
1972	4522[c]	.584	.444	1173

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12[a]	Actual Loss Rate	Percent White	Minority
1966							39877		41.9%	55294
1967				62096		39559	39559	- .8%	40.8%	57400
1968	6468	3134	3334	58762	-5.4%	37383	38159	-3.5%	39.9%	57478
1969	6185	2936	3249	55513	-5.5%	35327	34700	-9.1%	37.1%	58831
1970	5910	2593	3317	52196	-6.0%	33208	32133	-7.4%	35.1%	59414
1971	5642	2250	3392	48804	-6.5%	31049	26484	-17.6%	31.7%	57061
1972	5252	2188	3064	45740	-6.3%	29093	24094	-9.0%	29.4%	57860
1973	4769	2029	2740	43000	-6.0%	27347	20988	-12.9%	26.9%	57035
1974	4499	1953	2546	40454	-5.9%	25734	18654	-11.1%	25.3%	55079
1975	4524	1787[c]	2737	37717	-6.8%[c]	23984	17405	-6.7%	24.4%	53928
1976	4250	1519[c]	2463	35254	-6.5%[c]	22425	14958	-14.1%	22.9%	50297
1977	3876	1173[c]	2703	32551	-7.7%[c]	20698	13730	-8.2%	21.9%	48932

	WHITES, U.S. CENSUS			ANGLO				
	<5	10-14	Percent Anglo	<5	10-14		10 Year Retention	11 Year Retention
1950	52970	29715	.88	46614	26149	R_{50}	.605	.575
1960	40937	35243	.80	32750	28194	R_{60}	.478[c]	.444
1970	25304	25229	.62	15688	15642	R_{70}	.478[c]	.444

[a] Supplied by San Francisco Schools; excludes "other non-white."

[b] Interpolated.

[c] Possible effects of desegregation.

COURT ACTIONS (Johnson v. San Francisco)

1969	School Board plan adopted (partial)
1970	Start of school board plan.
1971	First court order and start of general desegregation.

WHITE ENROLLMENT PROJECTIONS FOR DETROIT, MICHIGAN, 1968-1977

Year	White Births	Retention Rate (R)	Net	Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12[b]	Actual Loss Rate	Percent White	Minority
1949	36384[a]	.613	22303											
1950	35984	.612	22022	1966				243014		126354	126354		42.5%	170681
1951	35553[a]	.611	21723	1967	22303	11789	10514	232500	-4.3%	120921	120544	-4.6%	40.9%	174321
1952	35123[a]	.610	21425	1968	22022	11636	10386	222114	-4.5%	115479	115295	-4.3%	39.1%	180005
1953	34692	.609	21127	1969	21723	11155	10568	211546	-4.8%	109936	108264	-6.1%	36.8%	185595
1954	33882	.608	20600	1970	21425	10614	10811	200735	-5.1%	104330	100717	-7.0%	34.8%	189046
1955	32131	.607	19504	1971	21127	10423	10704	189924	-5.3%	98800	96269	-9.6%	33.3%	193188
1956	31574	.606	19134	1972	20600	9380	11220	178704	-5.9%	92971	86555	-9.0%	30.8%	194521
1957	29418	.605	17798	1973	19504	8482	11022	167682	-6.6%	86835	74965	-13.4%	28.2%	190613
1958	27164	.604	16407	1974	19134	8267	10867	156815	-6.5%	81191	67833	-9.5%	26.4%	189563
1959	24260	.603	14629	1975	17798	8359	9439	147376	-6.0%	76319	56855	-16.2%	22.8%	192741
1960	22496	.602	13543	1976	16407	7108	9299	138077	-6.3%	71511	44614	-21.5%	18.7%	194600
1961	21296	.601	12799	1977	14629	5832	8797	129280	-6.8%	66648	36227	-18.8%	15.8%	192544
1962	19648	.600	11789											
1963	19426	.599	11636											
1964	18654	.598	11155											
1965	17808	.596	10614											
1966	17518	.595	10423											
1967	15792	.594	9380											
1968	14304	.593	8482											
1969	13964	.592	8267											
1970	14144	.591	8359											
1971	12048	.590	7108											
1972	9901	.589	5832											

WHITES, U. S. CENSUS

	<5	10-14		10 Year Retention	11 Year Retention
1950	150825	96185	R_{50}	.640	.612
1960	103729	96022	R_{60}	.630	.602
1970	59535	65310	R_{70}	.620	.591

[a] Interpolated or extrapolated.

[b] Supplied by Detroit Public School District; includes pre-K students for consistency with 1966-67 data.

COURT ACTIONS (Milliken v. Bradley)

1969-70	Board ordered plan (not implemented).
1971	First court order.
1972	Metro order (vacated, 1973).
1975-76	Start of general desegregation (January, 1976)

WHITE ENROLLMENT PROJECTIONS FOR PRINCE GEORGES COUNTY, MARYLAND 1968-1977

Year	White Births	Retention Rate (R)	Net	Year	Loss	Gain	Net Gain/ Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12	Actual Loss Rate	Percent White	Minority
1950	4493	1.32	5931	1966							108906		88.1%	14581
1951	(5046)[a]	1.32	6661	1967				122996		118476	118476	+8.8%	86.8%	17984
1952	(5599)[a]	1.31	7335	1968	5931	13330	+7399	130395	+6.0%	125585	124663	+5.2%	84.8%	22313
1953	6152	1.31	8059	1969	6661	14289	+7628	138023	+5.8%	132868	127438	+2.2%	82.1%	26743
1954	6186	1.30	8042	1970	7335	14115	+6780	144803	+4.9%	139379	127296	0.0%	79.5%	33101
1955	6661	1.30	8659	1971	8059	13791	+5732	150535	+4.0%	144954	123592	-3.3%	75.9%	39236
1956	7322	1.29	9445	1972	8042	13718	+5676	156211	+3.8%	150462	119033	-3.7%	73.5%	42396
1957	7602	1.29	9807	1973	8659	12852	+4193	160404	+2.7%	154525	107809	-9.4%	69.9%	46495
1958	8528	1.28	10916	1974	9445	12688	+3243	163647	+2.0%	157616	101497	-5.9%	67.1%	49713
1959	8886	1.28	11374	1975	10916	11400	+484	164131	+0.3%	158088	94872	-6.5%	64.0%	53464
1960	9604	1.27	12197	1976	11374	10113	-1261	162870	-0.8%	156824	87047	-8.2%	60.2%	57485
1961	9974	1.24	12368	1977	12197	8225	-3972	158898	-2.4%	153060	78476	-9.8%	56.3%	60826
1962	10002	1.22	12202											
1963	11202	1.19	13330											
1964	12318	1.16	14289											
1965	12382	1.14	14115											
1966	12424	1.11	13791											
1967	12702	1.08	13718											
1968	12240	1.05	12852											
1969	12318	1.03	12688											
1970	11400	1.00	11400											
1971	10426	.97	10113											
1972	8750	.94	8225											

WHITES, U. S. CENSUS

	<5	10-14	Retention	
1950	23861	11054	R_{50}	1.32
1960	43672	31498	R_{60}	1.27[b]
1970	56722	55675	R_{70}	1.00

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[a] Interpolated.

[b] Assumes no net growth in 1970s.

COURT ACTIONS (Vaughn's v. Board of Ed.)

1971	Suit brought.
1972	First order.
1973	Start of general desegregation.

ANGLO ENROLLMENT PROJECTIONS FOR DALLAS, TEXAS 1968-1976

ear	White Births	Anglo Fraction	Retention Rate (R)	Cohort Net
950	9764	.940	1.270	11656
951	(10653)[b]	.938	1.229	12281
952	(11543)[b]	.936	1.188	12835
953	12432	.934	1.147	13318
954	12792	.932	1.106	13186
955	12708	.930	1.065	12587
956	13144	.928	1.024	12490
957	12990	.926	.983	11824
958	13106	.924	.942	11408
959	12948	.922	.901	10756
960	13166	.920	.860	10417
961	12550	.909	.860	9811
962	12338	.898	.860	9528
963	12008	.887	.860	9160
964	11356	.876	.860	8555
965	10514	.865	.860	7821
966	10372	.854	.860	7618
967	10606	.843	.860	7689
968	11512	.832	.860	8237
969	12212	.821	.860	8622
970	12536	.810	.860	8733
971	11460	.799	.860	7875
972				

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12[a]	Actual Loss Rate	Percent Anglo	Min.
1966										
1967				152097						
1968	11656	9160	2496	149601	-1.6%	97888	97888		61.4%	61431
1969	12281	8555	3726	145875	-2.5%	95441	97103	-.8%	59.6%	65772
1970	12835	7821	5014	140861	-3.4%	92196	95012	-2.2%	58.2%	68341
1971	13318	7618	5700	135161	-4.0%	88508	86482	-9.0%	55.0%	70824
1972	13186	7689	5497	129664	-4.1%	84879	78434	-9.3%	51.9%	72655
1973	12587	8237	4350	125314	-3.4%	81993	69603	-11.3%	48.2%	74758
1974	12490	8622	3868	121446	-3.1%	79451	63503	-8.8%	45.4%	76519
1975	11824	8733	3091	118355	-2.5%	77465	57426	-9.6%	42.5%	77691
1976	11408	7875	3533	114822	-3.0%	75141	50008	-12.9%		
1977										

	WHITES, U.S. CENSUS		PERCENT ANGLO		ANGLOS				
	<5	10-14	<5	10-14	<5	10-14		10 Year Retention	11 Year Retention
1950	40268	20838	.94	.99	37852	20630	R_{50}	1.243	1.270
1960	59295	48488	.92	.97	54551	47033	R_{60}	.872	.860
1970	50636	55970	.81	.85	41015	47574	R_{70}	.872	.860

Figures supplied by school district; excludes kindergarten, which was started after desegregation.

Interpolated.

COURT ACTIONS (Estes v. Tasby)

1970	Suit brought (October).
1971	Order and start of partial desegregation (stayed white reassignment in August).
1976	Start of general desegregation in grades 4-8.

ANGLO ENROLLMENT PROJECTIONS FOR FORT WORTH, TEXAS, 1968-1976

Year	White Births	Anglo Fraction	Retention Rate (R)	Cohort Net
1950	6603	.940	1.051	6523
1951	(7019)[a]	.938	1.022	6729
1952	(7436)[a]	.936	.993	6911
1953	7852	.934	.964	7070
1954	7486	.932	.935	6523
1955	7418	.930	.906	6250
1956	7692	.928	.876	6253
1957	8128	.926	.847	6375
1958	7326	.924	.818	5537
1959	7298	.922	.789	5309
1960	7088	.920	.760	4956
1961	6606	.909	.760	4564
1962	6222	.898	.760	4246
1963	6002	.887	.760	4046
1964	6110	.876	.760	4068
1965	5452	.865	.760	3584
1966	5234	.854	.760	3397
1967	5345	.843	.760	3424
1968	6072	.832	.760	3839
1969	6228	.821	.760	3886
1970	6470[b]	.810	.760	3983
1971	5476	.779	.760	3242
1972				

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12	Actual Loss Rate	Percent Anglo	Min.
1966										
1967				77246		57579	57579		67.3%	28016
1968	6523	4046	2477	74769	-3.2%	55736	58011	+.8%	67.0%	28510
1969	6729	4068	2661	72108	-3.6%	53730	57429	-1.0%	65.2%	30600
1970	6911	3584	3327	68781	-4.6%	51258	56139	-2.2%	63.7%	31956
1971	7070	3397	3673	65108	-5.3%	48541	51436	-8.4%	61.3%	32476
1972	6523	3424	3099	62009	-4.8%	46211	48839	-5.0%	59.4%	33429
1973	6250	3839	2411	59598	-3.9%	44409	44455	-9.0%	57.6%	32678
1974	6253	3886	2367	57231	-4.0%	42633	41339	-7.0%	54.5%	34495
1975	6375	3983[b]	2392	54839	-4.2%[b]	40842	39525	-4.4%	53.0%	35083
1976	5537	3242	2295	52544	-4.2%	39127				
1977										

	WHITES, U.S. CENSUS		PERCENT ANGLO		ANGLOS			
	<5	10-14	<5	10-14	<5	10-14	10 Year Retention	11 Year Retention
1950	25658	14165	.94	.99	24119	14023	R_{50} 1.046	1.051
1960	32217	26002	.92	.97	29640	25222	R_{60} .779	.760
1970	26150	27173	.81	.85	21182	23097	R_{70} .779	.760

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[a] Interpolated.

[b] Possible effect of 1971 orders.

COURT ACTIONS (Flax v. Potts)

1961	Suit brought.
1971	Order and start of partial desegregation.
1973	Second order and start of general desegregation.

ANGLO ENROLLMENT PROJECTIONS FOR HOUSTON, TEXAS, 1968-1976

Year	White Births	Anglo Fraction	Retention Rate (R)	Cohort Net
1950	13556	.810	1.358	14911
1951	(14948)[a]	.808	1.323	15979
1952	(16340)[a]	.806	1.288	16966
1953	17732	.804	1.253	17863
1954	17650	.802	1.218	17241
1955	17946	.800	1.184	16998
1956	14678	.798	1.149	13458
1957	15088	.796	1.114	13379
1958	16372	.794	1.079	14026
1959	18252	.792	1.044	15092
1960	13324	.790	1.009	10621
1961	18352	.784	.975	14028
1962	18640	.778	.941	13646
1963	18174	.772	.907	12726
1964	17756	.766	.873	11874
1965	16568	.760	.840	10577
1966	16750	.754	.806	10179
1967	16966	.748	.772	9797
1968	17902	.742	.738	9803
1969	19114	.736	.704	9904
1970	18858[b]	.730	.670	9223
1971	17754[b]	.724	.670	8612
1972				

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12	Actual Loss Rate	Percent Anglo	Min.
1966										
1967				194208		132700	132700		55.6%	107649
1968	14911	12726	2185	192023	-1.1%	131240	131099	-1.2%	53.3%	114999
1969	15979	11874	4105	187918	-2.1%	128484	124451	-5.1%	52.7%	111769
1970	16966	10577	6389	181529	-3.4%	124116	119181	-4.2%	49.4%	121957
1971	17863	10179	7684	173845	-4.2%	118903	107517	-9.8%	46.4%	123976
1972	17241	9797	7444	166401	-4.3%	113790	98282	-8.6%	43.6%	127128
1973	16998	9803	7195	159206	-4.3%	108897	87776	-10.7%	40.4%	128206
1974	13458	9904	3554	155652	-2.2%	106501	83439	-4.9%	38.6%	130019
1975	13379	9223[b]	4156	151496	-2.7%[b]	103626	75085	-10.0%	36.5%	134190
1976	14026	8612[b]	5414	146082	-3.6%[b]	99895				
1977										

	WHITES, U.S. CENSUS		PERCENT ANGLO		ANGLOS				
	<5	10-14	<5	10-14	<5	10-14		10 Year Retention	11 Year Retention
1950	51361	29210	.81	.88	41602	25705	R_{50}	1.321	1.358
1960	87775	64658	.79	.85	69342	54959	R_{60}	1.008	1.009
1970	78119	88469	.73	.79	57027	69891	R_{70}	.695	.670

[a] Interpolated.

[b] Possible effect of desegregation.

COURT ACTIONS (Broussard v. Houston)

1966	Suit brought.
1970	Order of partial plan.
1971	Start of partial plan.
1973,75	Expansions of plan.

WHITE ENROLLMENT PROJECTIONS FOR OKLAHOMA CITY, OKLAHOMA, 1968-1976

Year	White Births	Retention Rate (R)	Net
1950	5717	1.050	6003
1951	(5963)[a]	1.037	6184
1952	(6208)[a]	1.024	6357
1953	6454	1.011	6525
1954	6426	.998	6413
1955	6595	.985	6496
1956	6662	.972	6475
1957	6710	.959	6435
1958	6734	.946	6370
1959	7316	.933	6826
1960	7572	.921	6974
1961	7390	.908	6710
1962	7664	.899	6890
1963	7170	.883	6331
1964	7054	.870	6137
1965	6096	.858	5230
1966	5512	.845	4658
1967	5364	.832	4463
1968	5526	.819	4526
1969	6064	.807	4894
1970	6394	.794	5077
1971	6000	.781	4686
1972			

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12	Actual Loss Rate	Percent White	Minority
1966							60288		79.9%	15169
1967				84370		59417	59417	-1.4%	79.1%	15699
1968	6003	6331	+328	84698	+.4%	59655	58472	-1.6%	78.2%	16255
1969	6184	6137	-47	84651	-.1%	59595	53470	-8.6%	73.3%	19475
1970	6357	5230	-1127	83524	-1.3%	58820	50495	-5.6%	72.1%	19547
1971	6525	4658	-1867	81657	-2.2%	57526	49571	-1.8%	71.7%	19569
1972	6413	4463	-1950	79707	-2.4%	56146	42224	-14.8%	70.1%	18051
1973	6496	4526	-1970	77737	-2.4%	54798	37453	-11.3%	69.3%	16586
1974	6475	4894	-1581	76156	-2.0%	53702	34568	-7.7%	66.8%	17147
1975	6435	5077	-1358	74798	-1.8%	52736	32861	-4.9%	65.0%	17691
1976	6370	4686	-1684	73114	-2.3%					
1977										

WHITES, U.S. CENSUS

	<5	10-14		10 Year Retention	11 Year Retention
1950	22784	14105	R_{50}	1.045	1.050
1960	33503	23911	R_{60}	.928	.921
1970	24036	28300	R_{70}	.811	.794

[a] Interpolated.

COURT ACTIONS (Dowell v. School Board)

1965	Suit brought.
1968	Order of partial secondary desegregation.
1969	Start of partial secondary desegregation.
1972	Order and start of general desegregation.

WHITE ENROLLMENT PROJECTIONS FOR LITTLE ROCK, ARKANSAS, 1968-1976

Year	White Births	Retention Rate (R)	Net
1950	1851	.892	1651
1951	(1898)[a]	.922	1750
1952	(1945)[a]	.952	1852
1953	1992	.982	1956
1954	1878	1.013	1902
1955	1973	1.043	2058
1956	2078	1.073	2230
1957	2186	1.104	2413
1958	2192	1.134	2486
1959	2134	1.164	2484
1960	2064	1.194	2464
1961	1850	1.164	2153
1962	2290	1.134	2597
1963	2164	1.104	2389
1964	2168	1.073	2326
1965	1790	1.043	1867
1966	1788	1.013	1811
1967	1822	.982	1789
1968	1860	.952	1771
1969	1818	.924	1680
1970	1832	.892	1634
1971	1816	.892	1620
1972			

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12	Actual Loss Rate	Percent White	Minority
1966										
1967		2597		27996		16018	16018		65.3%	8495
1968	1651	2389	+738	28734	+2.6%	16434	15895	-.8%	64.0%	8959
1969	1750	2326	+576	29310	+2.0%	16763	15264	-4.0%	62.0%	9364
1970	1852	1867	+15	29325	+.1%	16780	14815	-2.9%	60.6%	9639
1971	1956	1811	-145	29180	-.5%	16696	13273[b]	-10.4%	57.0%	10033
1972	1902	1789	-113	29067	-.4%	16629	11921	-10.2%	53.3%	10427
1973	2058	1771	-287	28780	-1.0%	16463	11562	-3.0%	51.0%	11110
1974	2230	1680	-550	28230	-1.9%	16150	10869	-6.0%	48.8%	11412
1975	2413	1634	-779	27451	-2.8%	15698	10399	-4.3%	47.0%	11727
1976	2486	1620	-866	26585	-3.2%	15196				
1977										

WHITES, U.S. CENSUS

	<5	10-14		10 Year Retention	11 Year Retention
1950	7400	4393	R_{50}	.901	.892
1960	7199	6665	R_{60}	1.175	1.194
1970	7015	8456	R_{70}	.901	.892[c]

COURT ACTIONS

1959	Suit brought.
1971	Order and start of general desegregation.

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[a] Interpolated.

[b] Based on known total, interpolated minority.

[c] Reduction to R_{50} assumed to obtain better pre-desegregation fit.

WHITE ENROLLMENT PROJECTIONS FOR JACKSON, MISSISSIPPI, 1968-1976

Year	White Births	Retention Rate (R)	Net
1950	1425	1.49	2123
1951	(1520)[a]	1.42	2158
1952	(1615)[a]	1.35	2180
1953	1710	1.28	2189
1954	1602	1.21	1938
1955	1557	1.14	1775
1956	1558	1.07	1667
1957	1680	1.00	1680
1958	1506	.93	1401
1959	1436	.86	1235
1960	2096	.79	1656
1961	2298	.79	1815
1962	2036	.79	1608
1963	1998	.79	1578
1964	1836	.79	1450
1965	1594	.79	1259
1966	1470	.79	1161
1967	1538	.79	1215
1968	1604	.79	1267
1969	1522	.79	1202
1970	1698	.79	1341
1971	1484	.79	1172
1972			

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12	Actual Loss Rate	Percent White	Minority
1966										
1967		1608		23425		21450	21450[b]		55.0%	17580
1968	2123	1578	-545	22880	-2.3%	20957	20793	-3.1%	53.6%	17980
1969	2158	1450	-708	22172	-3.1%	20307	20200[b]	-2.9%	52.4%	18380
1970	2180	1259	-921	21251	-4.[illegible]%	19454	12029	-40.4%	39.1%	18729
1971	2189	1161	-1028	20223	-4.8%	18520	11129[a]	-7.5%	36.7%	19229
1972	1938	1215	-723	19500	-3.6%	17853	10153	-8.8%	34.0%	19742
1973	1775	1267	-508	18992	-2.6%	17389	9353[a]	-8.6%	-----	-----
1974	1667	1202	-465	18527	-2.4%	16972	8496	-9.2%	30.6%	19298
1975	1680	1341	-339	18188	-1.8%	16666	8204	-3.4%	29.8%	19292
1976	1401	1172	-229	17959	-1.3%	16449				
1977										

WHITES, U.S. CENSUS

	<5	10-14		10 Year Retention	11 Year Retention
1950	5594	3319	R_{50}	1.437	1.49
1960	10784	8039	R_{60}	.807	.79
1970	6637	8708	R_{70}	.807	.79

COURT ACTIONS (Evers v. Jackson)

1963 Suit brought.
1970 Order and start of general desegregation.

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[a] Interpolated.

[b] Based on known total, interpolated minority.

PROJECTED WHITE ENROLLMENT FOR THE LOUISVILLE-JEFFERSON COUNTY SCHOOL DISTRICT, 1967-1977

Year	White Births	Retention Rate (R)	Net
1950	10898	1.062	11574
1951	(11262)[b]	1.054	11870
1952	(11626)[b]	1.046	12161
1953	11990	1.037	12434
1954	12762	1.029	13132
1955	13018	1.021	13291
1956	14070	1.013	14253
1957	14220	1.005	14291
1958	13706	.996	13651
1959	13660	.988	13496
1960	13528	.980	13257
1961	12994	.972	12630
1962	12672	.964	12216
1963	12340	.956	11797
1964	12036	.948	11410
1965	10586	.940	9951
1966	10322	.931	9610
1967	10092	.923	9315
1968	10126	.915	9265
1969	10528	.907	9459
1970	10940	.899	9835
1971	10542	.891	9393
1972	9107	.883	8041

Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected Public K-12	Actual 1-12[a]	Actual Loss Rate	Projected Private 1-12	Actual Private 1-12
1966										
1967				169153			107340			
1968	11574	11797	+223	169976	+.1%		110500	+2.9%		38277
1969	11870	11410	-460	169516	-.3%		113115	+2.4%		34180
1970	12161	9951	-2210	167306	-1.3%		116404	+2.9%		30157
1971	12434	9610	-2824	164482	-1.7%		116324	-.1%		28216
1972	13132	9315	-3817	160665	-2.3%		114800	-1.3%		26705
1973	13291	9265	-4026	156639	-2.5%	111131	111131	-3.2%	25718	25718
1974	14253	9549	-4704	151935	-3.0%	107797	103837	-6.6%	24946	27915
1975	14291	9835	-4456	147479	-3.0%	104563	92081	-11.3%	24198	30329
1976	13651	9393	-4258	143221	-2.9%	101531	87249	-5.2%	23496	32944
1977	13496	8041	-5455	137766	-3.8%	97673	82141	-5.9%	22603	33911

WHITES, U.S. CENSUS

	0-4	10-14		10 Year Retention	11 Year Retention
1950	47028	27711	R_{50}	1.056	1.062
1960	64260	49665	R_{60}	.982	.980
1970	49410	63085	R_{70}	.908	.899

Year	Projected Public & Private	Actual Public & Private	Actual Private 1-12
1968	148771	148777	
1969	147736	147295	-1.0%
1970	145667	146561	-.5%
1971	143191	144540	-1.4%
1972	139898	141505	-2.1%
1973	136400	136849	-3.1%
1974	132308	131752	-3.7%
1975	128339	122410	-7.1%
1976	124617	120193	-1.8%
1977	119882	116132	-3.4%

COURT ACTIONS

1971	Jefferson County suit filed.
1972	Louisville suit filed.
1973	First court order.
1974	Merger order (actually implemented by state board).
1975	Start of general desegregation.

[a] From Jefferson County Education Consortium (Johnson, et al, 1977).

[b] Interpolated.

[c] Based on 1969-77 projected loss rates for school-age population.

WHITE ENROLLMENT PROJECTIONS FOR SAN DIEGO,
1968-1977

Year	White Births	Anglo Fraction	Retention Rate (R)	Cohort Net	Year	Loss	Gain	Net Loss	Net K-12	Projected Loss Rate	Projected K-12	Actual K-12[a]	Actual Loss Rate	Percent Anglo	Min.
1950	8004	.860	1.20	8260	1966							94182		77%	27696
1951	(8875)[b]	.856	1.17	8888	1967				122310		95878	95878	+1.1%	76%	30281
1952	(9746)[b]	.852	1.14	9466	1968	8260	8341	+ 181	122491	+0.1%	95973	98163	+2.4%	76%	30540
1953	10610	.848	1.10	9903	1969	8388	7671	-1217	121274	-0.9%	95110	96221	-2.0%	74%	33310
1954	11232	.844	1.07	10143	1970	9466	6651	-2815	118459	-2.4%	92827	95208	-1.1%	74%	33672
1955	10672	.840	1.04	9323	1971	9903	6601	-3302	115157	-2.8%	90228	93829	-1.4%	73%	34498
1956	11346	.836	1.01	9580	1972	10143	6539	-3604	111553	-3.2%	87341	89307	-4.8%	72%	35227
1957	12244	.832	.98	9983	1973	9323	6675	-2648	108905	-2.4%	85245	87237	-2.3%	71%	36329
1958	12074	.828	.94	9397	1974	9580	6981	-2599	106306	-2.4%	83199	85823	-1.6%	69%	37291
1959	13198	.824	.91	9896	1975	9983	6934	-2947	103359	-2.8%	80869	82492	-3.9%	68%	39006
1960	12898	.820	.88	9307	1976	9397	5812	-3585	99774	-3.5%	78039	80153	-2.8%	66%	41270
1961	12716	.816	.88	9131	1977	9896	5702	-4194	95580	-4.2%	74761	75770	-5.5%	64%	42690
1962	12642	.812	.88	9033											
1963	11730	.808	.88	8341											
1964	10842	.804	.88	7671											
1965	9448	.800	.88	6651											
1966	9424	.796	.88	6601											
1967	9382	.792	.88	6539											
1968	9626	.788	.88	6675											
1969	10028	.784	.88	6981											
1970	10102	.780	.88	6834											
1971	8512	.776	.88	5812											
1972	8394	.772	.88	5702											

	WHITES, U.S. CENSUS		PERCENT ANGLO		ANGLOS				
	<5	10-14	<5	10-14	<5	10-14		10 Year Retention	11 Year Retention
1950	33515	16255	14%	12%	28823	14304	R_{50}	1.18	1.20
1960	56889	40662	18%	16%	46649	34156	R_{60}	.89	.88
1970	46126	52051	22%	20%	36080	41532	R_{70}	.89	.88

[a] Supplied by San Diego School District.

[b] Interpolated.

COURT ACTIONS (Carlin v. San Diego Schools)

1967	Suit filed.
1977	Hearing and order of a voluntary plan.

ANNUAL WHITE LOSS RATES IN
NORTHERN CONTROL DISTRICTS FROM THE ROSSELL STUDY[a]

	1969	1970	1971	1972	1973	1974	1975
New York	-3.1	-3.6	-2.8	-5.6	-5.0		
Syracuse	-3.2	-4.9	-4.4	-6.7	-4.2	-4.3	
Grand Rapids	1.7	- .1	-3.2	-4.0	-5.6	-5.8	-2.8
Toledo	1.4	-1.8	.2	-1.9	-4.9	-3.7	
Los Angeles	-2.6	-5.2	-4.5	-5.2	-7.4	-7.6	-4.0
San Diego	-2.0	-1.1	-1.4	-4.8	-2.3	-1.6	-3.9
Philadelphia	-3.5	-3.7	-5.1	+3.0	-7.9	-3.4	-2.8
Hartford	-9.1	-9.9	-6.1	-9.3	-8.3	-7.9	-7.8
Cleveland	-6.1	-1.5	-3.0	-3.2	-5.9	-5.1	-3.7
Youngstown	-7.3	-4.5	-1.0	-7.1	-1.3	-8.8	-12.1
Cincinnati	-3.2	-3.3	-4.8	-7.0	-9.1	-6.4	-3.3
Albuquerque	+ .7	+1.6	+1.0	+ .8	-3.0	-3.2	0
Jersey City	-3.5	-5.6	- .5	-6.7	-10.7	-8.7	-11.6
Phoenix	- .7	- .2	-1.1	-4.9	-2.3	-4.3	
Columbus, Ohio	-1.3	-1.3	- .7	-5.2	-5.5	-4.8	-3.9
Akron	-3.9	-1.8	-2.3	-3.7	-6.4	-5.0	-3.2
Kansas City, Kansas	-3.3	-2.3	-3.5	-6.3	-7.3	-6.9	-4.6
Omaha	- .7	1.6	0	-1.9	-4.9	-3.4	-3.1
Average White Loss	-2.76	-2.64	-2.4	-4.43	-5.67	-5.35	-4.77

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[a] Includes control group cities as well as northern "token desegregation" districts that showed no white reassignment and less than three percent black reassignment and which had total enrollments over 20,000 and minority enrollments in the 20-60 percent range in 1968 (Rossell, 1977).

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LEGAL ANALYSIS OF S. 528, 97TH CONG., 1ST SESS., THE "NEIGHBORHOOD SCHOOL ACT OF 1981"

Charles Dale
Legislative Attorney
American Law Division
May 7, 1981

SUMMARY

This report analyzes the legal and constitutional implications of S. 528, the "Neighborhood School Act of 1981," introduced by Senator Johnston, et al., on February 24, 1981. Section 2 of that bill states that the "neighborhood public school" is "the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States." To implement this congressional policy, §3 imposes certain limits on the authority of the Federal courts to require the transportation of any student beyond the public school "nearest the student's residence" in school desegregation cases. The bill's major restriction would operate to bar the courts from ordering the bus transportation of any student in excess of thirty minutes "total actual daily time" or ten miles "total actual round trip distance" beyond that required for the student's attendance at the "public school closest" to his or her residence. Based on a review of the case law, the report indicates that S. 528 could preclude judicial use of busing remedies heretofore approved by the Supreme Court in Swann v. Board of Education and its progeny to eliminate de jure or unconstitutional segregation from the public schools. This, in turn, raises issues of constitutional dimension related to Congress' power to legislate remedies for equal protection violation under §5 of the Fourteenth Amendment, or to restrict the jurisdiction of the Federal courts pursuant to Article III of the Constitution.

With regard to the §5 issue, the report suggests that, in view of the emphasis in Katzenbach v. Morgan and Oregon v. Mitchell, et al., on Congress' superior fact-finding capacity in framing remedies for equal protection violations, the limitations imposed by S. 528 may be entitled to judicial deference, particularly if the findings in §2 of the bill relative to the harms of busing are supported by other evidence adduced in congressional hearings and debate. However, because the bill could be viewed as restricting or abrogating, rather than expanding, a remedy essential to the right to a desegregated education in some cases, and involves the issue of Congress' power vis a vis the Federal courts rather than the States as in Morgan and Oregon, those precedents may not be totally applicable to S. 528. Another possible source of authority for the remedial limits of the bill, as they would apply to the use of busing by the lower Federal courts, may be found in Article III of the Constitution which empowers Congress to "ordain and establish" the inferior Federal courts. The Supreme Court has consistently construed Congress' power over the jurisdiction of the lower Federal courts to be virtually plenary. More problematic, however, is the issue whether Congress' Article III power to make "Exceptions and. . . Regulations. . ." to the Supreme Court's appellate jurisdiction would sanction the statutory withdrawl of Supreme Court authority to order busing remedies to effectuate the right to a desegregated education. Fundamental constitutional considerations related to separation of powers and the Supreme Court's essential function in giving uniformity and national supremacy to Federal law may operate as limitations upon Congress' Article III powers in relation to the appellate jurisdiction of the Supreme Court.

LEGAL ANALYSIS OF S. 528, 97TH CONG., 1ST SESS., THE "NEIGHBORHOOD SCHOOL ACT OF 1981"

INTRODUCTION

On February 24, 1981, Senator Johnston, on behalf of himself and several colleagues, introduced S. 528, the "Neighborhood School Act of 1981," which was referred to the Committee on the Judiciary. That bill would impose certain limits on the power of the Federal courts with respect to the grant of injunctive relief in suits to desegregate the public schools and would authorize the Attorney General to seek judicial enforcement of these limits on behalf of private parties in certain circumstances.

Section 2 of the bill contains a declaration of Congressional findings to wit: that court ordered transportation of students beyond the public school "closest to their residences" has been an "ineffective remedy" frequently resulting in an "exodus" of children and loss of community support for public school systems; that such transportation is "expensive and wasteful of scarce supplies of petroleum fuels;" and that student busing "to achieve racial balance" has been "overused" by the courts, is "educationally unsound," and actually causes racial imbalances in the schools "without constitutional or social justification." Accordingly, §2 concludes by stating that the assignment of children to their "neighborhood public school" is "the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States."

To implement this congressional policy, §3 of the bill would add a new subsection (c) to 28 U.S.C. 1651[1] providing that, except in certain limited circumstances,

> No court of the United States may order or issue any writ ordering directly or indirectly any student to be assigned or to be transported to a public school other than that which is nearest to the student's residence. . .

The bill provides for exceptions to this general limitation on judicial authority where more extensive transportation is required by a student's attendance at a "magnet," vocational, technical, or other specialized instructional program, is related "directly or primarily" to an "educational purpose," or is otherwise "reasonable." However, no such transportation requirement shall be considered reasonable if alternatives less onerous in terms of "time in travel, distance, danger, or inconvenience" are available. The cross-district busing of students would also be deemed unreasonable. Nor would a transportation plan be "reasonable" where it is "likely," presumably because of white flight or otherwise, to aggravate existing "racial imbalance" in a school system, or to have "a net harmful effect on the quality of education in the public school district." Finally, §3 would make it unreasonable, and therefore bar the courts from ordering, the bus transportation of any student that exceeds by thirty minutes or by ten miles the "total actual time" or "total actual round trip distance" required for the student's attendance at the "public school closest" to his or her residence.

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[1] This section currently provides:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Section 4 of the bill would amend Title VI of the 1964 Civil Rights Act[2] to authorize the Attorney General, on complaint by a student or his parent that "he has been required directly or indirectly to attend or to be transported to a public school in violation of the Neighborhood School Act," to initiate a civil action in Federal district court to enforce these limitations. Before instituting such action, the Attorney General must certify that the complaint is meritorious, and that the complainants are unable to maintain an appropriate action for relief. The Attorney General is authorized to implead as defendant such parties as may be necessary to the grant of effective relief.

I.

As is apparent from the bill's preambulatory findings, the basic legislative objective of the proposed act is to, in effect, constitutionalize the "neighborhood school" by imposing strict statutory limits on the power of the Federal courts to order the transportation of any student beyond the "closest" public school to his or her residence in desegregation cases. For purposes of the bill, it is indifferent whether the order or plan is directed to elimination of segregation _de jure_ in origin, that is, that caused by the intentional actions of school officials and traditionally condemned as a violation of the Equal Protection Clause of the Fourteenth Amendment, or _de facto_ and resulting without the complicity of State or local officials. Accordingly, the bill would make attendance at the neighborhood school the preferred method of student assignment, valid for all purposes under Federal law, and would sanction judicial departures from this policy only to the extent that they did not entail an increase beyond prescribed limits, in either the time or distance of travel, over that required for a student's attendance at the school closest to his or her home.

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[2] 42 U.S.C. 2000c et seq.

As such, it would not affect the authority of the courts to enforce remedies in school desegregation cases involving the reassignment between schools or the reformulation of school attendance boundaries which do not place a greater transportation burden on any affected child. Nor would the bill interfere with the use of other commonly employed desegregation remedies, such as voluntary majority to minority transfers, the establishment of "magnet" schools, school closings and new school construction, and the remedial assignment of of faculty and staff. Beyond this, however, the bill may import significant restrictions on Federal authority to impose "affirmative" remedies to redress conditions of State sanctioned segregation violative of equal protection guarantees.

Before proceeding further, however, it should be noted that certain language in the bill could invite a narrow judicial interpretation of the busing limitations with a view to reconciling them with existing authority under the Fourteenth Amendment. For instance, the congressional finding in §2(a)(4) that neighborhood public schools "should be employed to the maximum extent consistent with the Constitution of the United States" (emphasis added) finds a statutory parallel in the Scott-Mansfield amendment to Title II of the 1974 Education Amendments. That provision qualified a restriction on court ordered busing beyond the school "closest or next closest" to the home by stating that nothing in that Act "is intended to modify or diminish the authority of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments to the Constitution of the United States."[2a/] Taking a cue from the Scott-Mansfield language, the busing limitations in Title II were subsequently held by the courts not to bind judicial authority in cases involving constitutional violations, that is, where there has been a finding of

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[2a/] See, 20 U.S.C. 1702(b).

de jure segregation. Thus, in Dayton Board of Education v. Brinkman[2b] the Sixth Circuit pointed to the statement of congressional finding in §1702(b) in refusing to adhere to the "next closest school" limitation and ruled that the 1974 Act, taken as a whole, restricted "neither the nature nor scope of the remedy for constitutional violations in the instant case."

Another possible limiting construction is suggested by inclusion in §3 of language that would measure the time and distance limitations on student transportation by comparison to "the public school closest to the student's residence and with a grade level identical to that of the student." (emphasis added). During consideration of the fiscal 1977 Labor-HEW appropriations, Congress adopted a provision which, in terms somewhat analogous to the bill, directed HEW that it may not require the transportation of students beyond the school nearest the home "which offers the courses of study pursued by such student" in order to comply with Title VI of the 1964 Civil Rights Act.[2c] Nothwithstanding the explicit prohibitory language of the statute, and contrary indications in the legislative history, the Department of Justice subsequently issued an analysis that Congress did not intend to prohibit HEW required busing associated with the desegregation techniques of school "pairing" and "clustering."[2d/] Generally, pairing or clustering plans involve the division or reorganization of grade structures between or among two or more schools, with student attendance predicated on grade level rather than geographical proximity.

[2b] 518 F. 2d 853 (6th Cir. 1975), cert. denied 423 U.S. 1000 (1976). See, also, Morgan v. Kerrigan, 530 F. 2d 401 (1st Cir.), cert. denied 426 U.S. 935 (1976); Hart v. Community School Board, 512 F. 2d 37 (2d Cir. 1975); Evans v. Buchanan, 415 F. Supp. 328 (D. Del. 1976), aff'd 555 F. 2d 373 (3d Cir. 1977).

[2c] Section 208 of Pub. L. 94-439 (9/30/76). The Byrd Amendment provided in full as follows:

> None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with Title VI of the civil Rights Act of 1964.

The Justice Department relied in part on the above qualification in the Byrd amendment to reach this conclusion. It reasoned from the Byrd language that Congress intended the transportation limits to apply only after pairing or clustering of schools, not to the original student assignment scheme. That is, a student could be assigned or required to attend a school beyond the prescribed limits if, because of a grade structure reorganization adopted for desegregation purposes, the school nearest the home did not provide "the course of study pursued by such student." The similarity of the Byrd language to that proposed in the busing provisions of the bill suggest that the latter's time and distance limitations could likewise be interpreted in a manner contrary to the probable intent of its sponsers.[2e/]

[2d/] See, 123 Cong. Rec. 10908 (daily ed. 6/28/77).

[2e/] This result could probably be avoided, however, by the addition of language to eliminate any inherent ambiguity and narrowing the scope of the present qualifying language. An example may be found in the Eagleton-Biden Amendment adopted in 1977 as a response to the Justice Department interpretation of its predecessor, the Byrd Amendment. Eagleton-Biden, first enacted by the fiscal 1978 Labor-HEW appropriations, §208, Pub. L. 95-205, 91 Stat. 1460 (12/9/77) incorporated the Byrd language but added the following:

> For the purpose of this section an indirect requirement of transportation of students includes transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing, or clustering. The prohibition in this section does not include the establishment of magnet schools.

Barring these or other narrow judicial interpretations of the bill's language, it may be appropriate, in order to more fully appraise its legal and constitutional implications, to review the course of Supreme Court decisions stemming from Brown v. Board of Education.[3] In Brown the Court held that the Equal Protection Clause forbade State policies mandating the separation of students in the public schools on the basis of race. In striking down State statutes which required or permitted, by local option, separate schools for black and white children, the Court declared that the "separate but equal" doctrine announced in Plessy v. Ferguson[4] had no place in public education.

But over the next two decades, the nature of the obligation placed on school officials evolved from the mere cessation of overt racial assignment, the target of Brown, to elimination of the "effects" of the former dual system. In Green v. County Board of Education[5] the Court held that school officials had an "affirmative duty" to abolish the "last vestiges" of a dual school system, including all "racially identifiable" schools. In addition to the racial composition of their student bodies or staffs, schools could be racially identifiable by comparison with other schools in the district if the quality of their physical facilities, curricula, or personnel differ significantly. Although there is no duty to make schools identical in all respects, there is a "presumption" against schools that are one race or "substantially disproportionate" in racial composition, or that otherwise diverge markedly from the norm defined by these criteria. Thus, the Court in Swann v. Board of Education[6] and later cases[7] held that such differences between schools in a former statutory dual system establishes a prima facie case that school officials are continuing to discriminate or that they have failed in their duty to remedy fully the effects of past discrimination. Since the 1973 ruling in the Denver case, Keyes v. School District No. 1,[8] it is also clear that the same affirmative constitutional duty attaches where de jure segregation in a "meaningful portion" of the system results from intentional school board policies in a district without a prior history of statutory dual schools.

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[3] 347 U.S. 483 (1954).

[4] 163 U.S. 537 (1895).

[5] 391 U.S. 430, 438-9 (1968). In Green, the Court declared that "[s]chool boards. . .operating state compelled dual school systems [are] nevertheless charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination [is] eliminated root and branch." This affirmative duty requires the "school board today. . .to come forward with a plan that promises realistically to work, and promises reaslistically to work now." See, also, Alexander v. Holmes County Board, 396 U.S. 19 (1969).

The Court in Swann sought to define the scope of judicial authority to enforce school district compliance with this constitutional obligation and set out "with more particularity" the elements of an acceptable school desegregation plan. With respect to the assignment of pupils, the Court stated that in eliminating illegally segregated schools, the "neighborhood school" or any other student assignment plan "is not acceptable because it appears to be neutral." Rather, in a system that is de jure segregated, a constitutionally adequate plan may require "a frank--and sometimes drastic--gerrymandering of school districts and attendance zones," resulting in zones "neither compact nor continguous, indeed they may be at opposite ends of the city." Accordingly, the Federal courts may require school officials to implement plans involving "gerrymandering of school districts. . .[and] 'pairing,' 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly Negro schools and transfer of white students to formerly all-Negro schools."[9]

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[6] 402 U.S. 1 (1971).

[7] Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979).

[8] 413 U.S. 189 (1973).

A related aspect of the Swann decision was its qualified endorsement of student transportation as a desegregation remedy. The Court cautioned that "the permissible scope of student transportation" could not, because of the "very nature" of the desegregation process, be precisely defined "for the infinite variety of problems presented in thousands of situations." Nonetheless, finding that "[d]esegregation plans cannot be limited to the walk-in school," the Court held that, "as a normal and accepted tool of educational policy," busing for desegregation purposes could, subject to certain limitations, be employed "where the assignment of children to the school nearest their home would not produce an effective dismantling of the dual system." While suggesting limits, however, the Court declined to provide any "rigid guidelines" for future cases, saying only that busing could be used where "feasible," and that its use was to be limited by considerations of times and distances which would "either risk the health of the children or significantly impinge on the educational process."[10] In addition, limits on time of travel would vary with many factors, "but probably with none more than the age of the students."[11]

Three companion cases decided by the Court on the same day as Swann also addressed the judicial use of remedial student assignments and busing in school desegregation cases. In Davis v. Board of School Commissioners[12] the Court reversed the Fifth Circuit Court of Appeals for failing to achieve adequate desegregation of Mobile County, Alabama. The Fifth Circuit had affirmed a desegregation order that did not require busing of students across a major highway which divided Mobile into district zones. The Supreme Court's reversal was critical of the appeals court decision because "inadequate consideration was given to the possible use of bus transportation and split zoning."

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[9] 402 U.S. at 27.

[10] 402 U.S. at 30-31.

[11] 402 U.S. at 31.

> As we have held, 'neighborhood school zoning,' whether based strictly on home-to-school distance or on 'unified geographic zones' is not the only constitutionally permissible remedy; nor is it *per se* adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontinguous attendance zones. [citing Swann]. The measure of any desegregation plan is its effectiveness. [13]

In McDaniel v. Barresi[14] the Court reversed a ruling of the Georgia State Supreme Court that a school desegregation plan imposed by the former Department of H.E.W. under Title VI of the 1964 Civil Rights Act violated the rights of white students and their parents because it treated students differently on account of race. The Court held that in compliance with its duty under Green and Swann to convert to a unitary system, the local board of education of Clark County, Georgia had properly considered the race of the students in fixing school attendance boundaries.

> In this remedial process, steps will almost invariably require that students be assigned 'differently because

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[12] 402 U.S. 33 (1971).

[13] 402 U.S. at 37.

[14] 402 U.S. 39 (1971).

> of their race.' [citation omitted] Any other approach would freeze the status quo that is the target of all desegregation processes. [15]

Finally, in North Carolina Board of Education v. Swann,[16] the Court held unconstitutional North Carolina's anti-busing law, which forbade the assignment or transportation of any student on the basis of race or for the purpose of achieving racial balance in the public schools. The State statute was found to prevent implementation of desegregation plans required by the Fourteenth Amendment and was therefore unconstitutional. According to Chief Justice Burger, "[b]us transportation has long been an integral part of all public school systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."[17]

In his ruling on application for a stay order in Winston-Salem/Forsyth County Board of Education v. Scott,[18] Chief Justice Burger, sitting as Circuit Justice, offered some additional indication of the limits imposed by Swann on student busing. The Chief Justice found "disturbing" the district court's apparent agreement with the school board that Swann required that each school have a proportion of blacks and whites corresponding to the proportion prevailing in the system as a whole. He denied the stay application, but only after chastising the board for being vague in its reference to "one hour average travel time," and indicated, "by way of illustration," that three hours would be "patently offensive" when school facilities are available at a lesser distance. The Chief Justice also stressed that he would be disposed to grant the application for stay if it had been made earlier and seemed especially concerned that the court's order called for 16,000 more students to be transported in 157 more buses, nearly double the number before adoption of the plan.

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[15] 402 U.S. at 41.

[16] 402 U.S. 42 (1971).

[17] 402 U.S. at 46.

[18] 404 U.S. 1221 (1971).

Short of the presumptive upper limit of three hours suggested by the Chief Justice in Winston-Salem/Forsyth case, and the broad health and safety limitations noted in Swann, there appear to be no hard and fast rules as to the time or distance of travel that will be permitted. As in other equity cases, the lower Federal courts were vested by Swann with "broad discretion" to determine, in the first instance, what specific measures may or may not be necessary to achieve "the greatest possible degree of actual desegregation" in a given case. Thus, for example, in Mannings v. Board of Public Instruction,[19/] the Fifth Circuit approved a plan to desegregate the Tampa, Florida schools which required the transportation of some 20,000 additional students for bus rides averaging 45 minutes to 1 1/2 hours one way. On the other had, the Sixth Circuit in the Memphis case,[20/] where total desegregation could have been accomplished by a plan involving bus rides up to 60 minutes, affirmed a plan which left some 25,000 black students in 25 all-black schools, but which reduced the average bus ride to 38 minutes each way, with no rides over 45 minutes in length. The courts in several other cases have attempted to gauge the extent of required busing to that involved in the Swann case. Under the plan approved by the Supreme Court in Swann, trips for elementary school students averaged about seven miles and the trial court had found that they would take "not over 35 minutes at most." The Supreme Court noted that this compared favorably with the transportation plan previously operated in Charlotte under

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[19/] 427 F. 2d 874 (5th Cir. 1971).

[20/] Northcross v. Board of Education, 341 F. Supp. 583 (W.D. Tenn. 1972), aff'd 489 F. 2d 15 (6th Cir. 1973), cert. denied. 416 U.S. 962 (1974).

which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour.[21]

As this sampling of cases suggests, it is impossible to determine in advance the impact of the bill's restrictions, in any particular case, on the courts' discretion to order relief necessary for compliance with the remedial principles of *Swann* and related cases. This is particularly so because, in addition to the time and distance limitations in §3, the bill employs other non-quantitative, and perhaps unquantifiable, restrictions on judicial authority to order student transportation. For example, irrespective of considerations of travel time or distance, the bill would preclude transportation orders that are "likely" to aggravate "racial imbalance" in the system, because of white flight or otherwise, or to have "a net harmful effect on the quality of education" in the system, or where "reasonable alternatives" exist. In some cases, the *Swann* standards might be met without requiring busing beyond the limits imposed by the bill, but in the circumstances of the *Swann* case itself, and a substantial number of cases where it has been employed, some more extensive busing might be required to desegregate schools to the extent mandated by current constitutional standards. In these cases, the courts would be effectively restrained from fully exercising the equitable discretion they possess under existing precedent. To the extent that S. 528 may vary from or alter the remedial powers of the courts in school desegregation cases, its constitutional validity may depend on the reach of Congress' authority under §5 of the Fourteenth Amendment, which is cited as authority in §2(b) of the bill,[22] to define the scope of equal protection guarantees. Another potential source of legislative authority for the proposed restrictions may derive from Article III of the Constitution which grants Congress the power to restrict the original jurisdiction of the lower Federal courts and the appellate jurisdiction of the Supreme Court in certain cases. The remainder of this report analyzes both these sources in relation to Congress' power to enact the busing limitations in S. 528.

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[21] See, e.g., *Vaughn v. Board of Education of Prince George's County*, 355 F. Supp. 1051 (D. Md. 1972), *aff'd* 468 F. 2d 894 (4th Cir. 1973) (maximum busing time of 35 minutes per pupil, with mean average of 14 minutes per one-way bus trip compared with 35 minute maximum in *Swann* though that represented a reduction in maximum one-way bus trips prior to desegregation in that case); *Brewer v. School Board of City of Norfolk, Va.*, 456 F. 2d 943 (4th Cir.), *cert. denied* 406 U.S. 905 (1972) ("30 minutes each way" not "substantially different" from that required by *Swann*); *Moss v. Stamford Board of Education*, 365 F. Supp. 675 (D. Conn. 1973) (plan provided "maximum time to be spent on the buses by any child is 34 minutes--slightly less than the maximum time in the *Swann* case and therefore acceptable"); *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd* 530 F. 2d 401 (1st Cir. 1976) (under final plan approved for the Boston schools "the average distance from home to school will not exceed 2.5 miles, and the longest possible trip will be shorter than 5 miles" with travel time averaging "between 10 and 15 minutes each way, and the longest trip will be less than 25 minutes").

II.

Section 5 of the Fourteenth Amendment vests with Congress the "power to enforce, by appropriate legislation, the provisions of this article." The first significant recognition of Congress' role in the definition of constitutional rights and implementing remedies under §5 is found in Katzenbach v. Morgan[23] which interpreted the section as a "positive grant" to Congress of "the same broad powers expressed in the Necessary and Proper Clause." The Supreme Court there held that §4(e) of the Voting Rights Act of 1965, which invalidated a New York literacy requirement for voting as applied to Puerto Rican residents educated in American Flag schools, was appropriate legislation under §5. This was so despite the Court's own refusal, in Lassiter v. Northampton Election Board,[24] to strike down State literacy requirements for voting as a violation of the Equal Protection Clause in the absence of any discriminatory use of the test. To be appropriate legislation, §4(e) had to be "plainly adopted to the end" of enforcing equal protection and "not prohibited by, but. . .consistent with the letter and spirit of the Constitution."

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[22] Section 2(b) of the bill states: "The Congress is hereby exercising its power to enforce, by appropriate legislation, the provisions of the fourteenth amendment."

[23] 384 U.S. 641 (1966).

The decision in Morgan rested on two separate rationales, both involving a major extension of congressional enforcement authority under §5. First, Justice Brennan, writing for [redacted] the separate concurrence of Justice Douglas, characterized §5 as a broad grant of discretionary power to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[25] In this view, Congress is empowered by §5 to enact prophylactic measures to ensure enjoyment of equal protection guarantees against the potentiality of official discrimination and to remove obstacles to the States' performance of their obligations under the amendment. As in reviewing necessary and proper clause legislation, where the Court is able "to perceive a basis" for the congressional determination, its inquiry is at an end. Here, the Court held,

> It is for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations--the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interest that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.[26]

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[24] 360 U.S. 45 (1959).

[25] 384 U.S. at 650-51.

[26] 384 U.S. at 653.

Thus, despite the absence in the record of any actual discrimination by New York in the provision of such services, it was within Congress' power to act to insure that Puerto Ricans have the political power to enable them "better to obtain 'perfect equality of civil rights and the equal protection of the laws.'"[27/] The second branch of Morgan held that §5 confers independent authority on Congress to find that a State practice violates the Equal Protection Clause even if the Court is unwilling to make the same determination.

> Here, again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement. . .constitute[s] an invidious discrimination in violation of the Equal Protection Clause. [28/]

Accordingly, the majority in Morgan suggested not only that Congress has authority under §5 to define as well as remedy denials of equal protection but also that the courts should defer to congressional exercise of that authority.

Justices Harlan and Stewart, who joined in the only dissenting opinion, rejected both branches of the majority's rationale. They dismissed the remedial theory as inapplicable to the challenged legislation. Since §4(e) had been introduced from the floor during debate on the Voting Rights Act, there had been no investigation of legislative facts to support a finding of discrimination against Puerto Ricans in rendering of governmental services. As to the second rationale, their objection was more fundamental. The issue whether New York's denial of voting rights to those subsequently enfranchised by §4(e) violated equal protection was a judicial question which could not be resolved by Congress. A congressional determination that Spanish-speaking citizens are as capable of making informed decisions in elections as English-speaking citizens might have some bearing on that judicial decision, but in the dissenters' view,

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[27/] 384 U.S. at 653.

[28/] 384 U.S. at 656.

courts should, in interpreting the Equal Protection Clause, give no more deference to congressional judgments than those of State legislatures.[29]

The broad language of the Morgan majority might support congressional prescription of the remedial standards in S. 528 even if they impose limits, in terms of time or distances of travel or otherwise, on judicially ordered student transportation to effectuate public school desegregation. But this conclusion is rendered less certain by indications in Morgan that Congress may only exercise its §5 authority to facilitate the realization or extend the protections of the Fourteenth Amendment. Morgan upheld a voting eligibility standard arguably more liberal than the judicially defined constitutional requirement. A caveat to the Court's opinion in Morgan emphasized the distinction between the power to expand and the power to restrict the reach of equal protection thusly:

> Section 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing States to establish racially segregated systems of education would not be--as required by section 5--a measure 'to enforce'

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[29] According to the dissenters:

> . . .[W]e have here not a matter of giving deference to a congressional estimate based on its determination of legislative facts, bearing upon the validity vel non of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe that it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights. 384 U.S. at 669-70 (dissenting opinion).

> the Equal Protection Clause since that clause of its own force prohibits such state laws. 30/

Accordingly, insofar as S. 528 would place limits on transportation remedies that could interfere with effectuation of the right to a desegregated public education as defined in the case law, it may come within this explicit exception to the *Morgan* doctrine. 31/ In addition, *Morgan* concerned a congressional statute directed to certain actions by the States. The remedial standards in S. 528, on the other hand, directly implicate the equitable power of the Federal courts and may, therefore, involve different considerations. 32/ Finally,

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30/ 384 U.S. at 651-52, n. 10.

31/ However, Professor Charles Alan Wright, a noted constitutional scholar at the University of Texas, concluded in congressional testimony on earlier busing legislation that:

> Neither *Swann* nor any other Supreme Court case holds that there is a constitutional right to attend a racially balanced school or a constitutional right to be taken to school by bus for that purpose. *Swann* explicitly rejected the notion that the Constitution requires racial balance, 402 U.S. at 24, and recognized that one race schools may remain so long as they are not part of state-enforced segregation, 402 U.S. at 25-26. It would seem that the power of Congress to speak to the question of remedy and to say whether and under what circumstances a particular remedy is to be used, is no less for violation of the Equal Protection Clause than it is for violation of the fourth amendment, the Self Incrimination Clause, the Due Process Clause, or any other provision of the Constitution.

A Bill to Further the Achievement of Equal Educational Opportunities: Hearings on H.R. 13915 Before the House Committee on Education and Labor, 92d Cong., 2d Sess. 1163 (1972) (statement of Charles Alan Wright).

32/ In this regard, one commentator has noted:

> Whatever the reach of section 5 as a vehicle for augmenting the power of Congress to regulate matters otherwise left to the States, it provides no authority for Congress to interfere with the execution or enforcement of federal court judgments or to overturn federal judicial determinations of the requirements of the fourteenth amendment. The entire fourteenth amendment increased congressional power at the expense of the states, not of the federal courts.

Rotunda, R.D., *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 Geo. L. J. 839, 859 (1976).

the full breadth of congressional power elaborated in Morgan may not command a majority of the present court.

Four years after Morgan, the Court in Oregon v. Mitchell[33/] reconsidered the breadth of congressional power under §5 within the context of the 1970 amendments to the Voting Rights Act which, inter alia, mandated a minimum voting age of 18 for all elections, State and Federal, contrary State law notwithstanding. A literal reading of Morgan suggests that the congressional determination would be upheld provided that there was a perceptible basis for concluding that the extension of the franchise to 18 years old was necessary to effectuate Fourteenth Amendment guarantees or, alternatively, that such age discrimination was an invidious classification unsupported by a "compelling state interest." However, only three Justices, Brennan, White, and Marshall, fully embraced the broad rationale of Morgan while Justice Douglas, in a partial concurrence, found simply that "Congress might well conclude that a reduction of the voting age from 21 to 18 was needed in the interest of equal protection." Justices Stewart, Burger, Blackmun, and Harlan found that Congress lacked the power under §5 to change age qualifications for State elections. The deciding vote was cast by Justice Black who found that Congress' §5 power was limited by the Constitution's delegation to the States of the power to determine qualifications for State elections.

The Court thus rejected 5 to 4 the application of the 18 year age requirement to State elections, but the conflicting rationales of the Justices served only to obscure the issue of the scope of congressional power under §5. Justice Brennan, joined by Justices White and Marshall, reasoned on the

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[33/] 400 U.S. 112 (1970).

basis of the second branch of Morgan that, whatever the Court's view of excluding 18 year olds from the vote, Congress' determination was entitled to deference because "proper regard for the special function of Congress in making determinations of legislative fact compels the Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases."[34] Elaborating further on the justification for judicial deference to congressional fact-finding, Justice Brennan stated:

> The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.' 35/

A significant aspect of Justice Brennan's opinion in Oregon was its apparent reformulation of the limiting principle in Morgan predicated on the dilution of equal protection rights. Instead of the Morgan distinction between legislative dilution versus expansion, Justice Brennan emphasized as critical under §5 Congress' superior capacity to "determine whether the factual basis necessary to support a state legislative discrimination actually exists."

> A decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be unreasonable. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature. 36/

Although not entirely clear, this statement may imply, contrary to Morgan,

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34/ 400 U.S. at 240.

35/ 400 U.S. at 247-48.

36/ 400 U.S. at 249, n. 31.

an indefinite power in Congress, as legislative fact-finder, to narrow the scope of equal protection and due process rights on the basis of new evidence.

Five members of the Court took issue with Justice Brennan's position, finding various limitations on Congress' §5 power. Justice Black argued that Congress has power under §5 to override an express delegation to the States only in cases of racial discrimination.[37/] Justice Harlan, after determining that the Fourteenth Amendment was not intended to reach discriminatory voter qualifications of any kind, rejected the notion that Congress has a "final say on matters of constitutional interpretation. . . as fundamentally out of keeping with the constitutional structure." Justice Stewart, joined by the Chief Justice and Justice Blackmun, read Morgan to give Congress power to do no more than "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause."[38/] They argued that §4(e) had been upheld on the alternative ground of remedying discrimination against Puerto Ricans in the furnishing of public services. Discrimination against Puerto Ricans was an undoubted invidious discrimination. Thus, Morgan's two branches merely allowed Congress to act upon established unconstitutionality, to impose upon the States remedies "that elaborated upon the direct command of the Constitution," and to overturn State laws if "they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion."[39/] But, in their view, nothing in Morgan sustained congressional power to "determine as a matter of substantive

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[37/] 400 U.S. at 129.

[38/] 400 U.S. at 296.

[39/] 400 U.S. at 296.

constitutional law what situations fall within the ambit of the [equal protection] clause, and what state interests are 'compelling.'"[40]

The opinions of a majority of Justices in Oregon appear to have severely undermined Morgan's second rationale that §5 authorizes Congress to define the substantive reach of the Equal Protection Clause by invalidating State legislation. The first branch of Morgan, however, recognizing congressional power to act to remedy State denials of equal protection appears to have survived, at least with respect to State practices aimed at "discrete and insular" minorities.[41] As in Oregon, the Court in Fullilove v. Klutznick[42] relied on Congress' competence as legislative fact-finder to uphold a statutory remedy enacted pursuant to §5. It there approved the minority business enterprise (MBE) set aside provision in the Public Works Employment Act of 1977[43] on the basis that the program was aimed at remedying a discriminatory situation found to exist by Congress.

> With respect to the MBE provision, Congress has abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination ... Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection laws.[44]

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[40] 400 U.S. at 295-6.

[41] See, 400 U.S. at 129 (Black, J.). It appears that, even in Justice Stewart's view, although Congress can act only upon the "direct command of the Constitution," it can circumvent that limitation by hypothesizing the existence of racial discrimination and declaring that its enactment is necessary to correct that discrimination. See, 400 U.S. at 295, n. 14 (Stewart, J., concurring in part and dissenting in part).

[42] 100 S. Ct. 2758 (1980).

[43] 42 U.S.C. 6701 (1979 Supp.).

[44] 100 S. Ct. at 2774-75.

The distinction between rights and remedies for constitutional violations, as it relates to the power of Congress, has found expression in other contexts as well. In City of Rome v. United States,[45] the Court upheld Congress' power to enact such remedial legislation pursuant to its comparable enforcement authority under section 2 of the Fifteenth Amendment. At issue in this case was the constitutionality of the Voting Rights Act of 1965, as amended, and its applicability to electoral changes and annexations made by the city of Rome, Georgia. Such changes were deemed to have the effect of denying the right to vote on account of race or color, and thus were in violation of the Act. The Court specifically held that, "even if §1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to §2, outlaw voting practices that are discriminatory in effect."[46] The Court in City of Rome relied to a great extent on its holding in South Carolina v. Katzenbach[47] which dealt with remedies for voting discrimination. It also cited Katzenbach v. Morgan. The Court wrote:

> ... In the present case, we hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that §1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. [48]

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[45] 446 U.S. 156 (1980).

[46] 446 U.S. at 173.

[47] 383 U.S. 301 (1966).

[48] 446 U.S. at 177.

Similarly, in Bivens v. Six Unknown Fed. Narcotics Agents,[49] the Court alluded to the power of Congress over remedies in the context of an action for damages against Federal officials for violation of Fourth Amendment rights. In holding a damage remedy implied by the constitutional prohibition against unreasonable searches and seizure, the Court sustained the action, but acknowledged its deference to Congress, noting that "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Chief Justice Burger, joined in dissent by Justices Black and Blackmun, urged Congress, without adverting to Morgan or Oregon, to create different rules to supplant judicially created standards to implement Fourth Amendment rights.[50] A noted legal commentator has conceived the matter as follows:

> The denial of any remedy is one thing. . . .But the denial of one remedy while another is left open, or the substitution of one remedy for another, is very different. It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension. [51]

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[49] 403 U.S. 388, 397, (1971).

[50] Chief Justice Burger was particularly critical of the judicially created exlusionary rule, requiring the suppression of illegally seized evidence in Federal criminal trials, and stated:

> Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials. 403 U.S. at 421.

[51] Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1366 (1953).

It is therefore possible that Congress' power under §5 to legislate remedies for judicially recognized violations of the Equal Protection Clause, as affirmed in Morgan and arguably preserved by Oregon and later cases, could be advanced in support of the restrictions on busing in S. 528. Of significance in evaluating these limits may be the language in the Swann decision which permits the district courts to deny busing when "the time or distance of travel is so great as to risk either the health of the children or significantly impinge the educational process."[52/] The Swann Court also acknowledged that the fashioning of remedies is a "balancing process" requiring the collection and appraisal of facts and the "weighing of competing interests," a seemingly appropriate occasion under Morgan for congressional intervention. In addition, busing is only one remedy among several that have been recognized by both the courts and Congress to eliminate segregated public schools.[53/] Thus, the findings in §2 of the bill relative to the harms of busing, particularly if supported by other evidence adduced in congressional hearings or debate, may comport with the emphasis of Justice Brennan's opinion in Oregon on

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52/ 402 U.S. at 30-31.

53/ In enacting Title II of the Education Amendments of 1974, captioned "Equal Educational Opportunities and Transportation of Students," Congress specified practices which are to be considered denials of due process and equal protection of the laws and delineated a "priority of remedies," ranging from more preferred to less preferred and even prohibited. Thus, the courts are directed to consider and make specific findings with regard to the efficacy of the following before requiring implementation of a busing plan:

> (a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;
>
> (b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

"(Continued)"

Congress' superior fact-finding competence, and therefore be entitled to judicial deference.[54/] By contrast, the dissenters in Morgan found §4(e) of the Voting Rights Act failed to qualify as a remedial measure only because of the lack of a factual record or legislative findings.

Complicating this conclusion, however, are judicial statements implying that the elimination of busing as a remedy to the extent contemplated by the

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"(Continued)"

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title. 42 U.S.C. 1713.

54/ Richard Kleindienst, Acting Attorney General, while testifying before the House Committee on the Judiciary, stated:

> The question here is the appropriate remedy for implementation of the right to a desegregated education, an area in which Congress' special fact finding expertise should be utilized. Legitimate questions that might be raised in the area are, for example: How much busing will harm the health of a child? How much may impair the educational process? How great are the benefits to children in receiving a desegregated education compared to the detriments of busing? These are essentially legislative--not judicial--questions.

Proposed Amendment to the Constitution and Legislation Relating to Transportation and Assignment of Public School Children: Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 92d Cong., 2d Sess. 1145 (1972) (statement of Hon. Richard G. Kleindienst, Acting Attorney General of the United States).

bill may be fraught with constitutional difficulty. For example, in North Carolina Board of Education v. Swann,[55] the Supreme Court invalidated an analogous State law restriction on busing for desegregation purposes noting that "it is unlikely that a truly effective remedy could be devised without continued reliance upon it." This, and the consistent judicial emphasis on affirmative desegregation remedies since Green, suggests that the correlative right to attend and the obligation to establish racially desegregated schools are inseparable. Accordingly, the distinction in Morgan and Oregon between constitutional rights and remedies may become blurred in the school desegregation context in those cases where student transportation, beyond the limits prescribed by the bill, is deemed necessary for compliance with current constitutional standards. Of course, the fact that the State courts are left free by the bill to order any form of remedy to implement a desegregation plan may be argued in reply to objections that busing may be the only effective remedy available in some circumstances. Nonetheless, because the bill could be viewed as restricting or abrogating a remedy essential to the right to a desegregated education in such cases, and involves the issue of Congress' power vis a vis the Federal courts rather than the States as in Morgan and Oregon, substantial questions relative to the application of those precedents to congressional authority to enact S. 528 remain. In the final analysis, the validity of the bill as an exercise of congressional power under §5 may depend upon whether the busing restrictions are viewed as based on a rationally supportable factual determination of the effectiveness of such remedies within the constitutional framework of Swann and related cases, or are instead a declaration of a constitutional standard in conflict with prevailing judicial standards.

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[55] 402 U.S. 43, 46 (1971).

III.

An alternative source of congressional authority for the remedial limitations imposed by S. 528 may reside in Article III of the Constitution which defines and delimits the judicial power of the United States. Article III does not by its terms create any of the inferior Federal courts, but instead confers that power on Congress:

> Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . [56]

Congressional power over the appellate jurisdiction of the Supreme Court is found in Article III, Section 1 which defines the original and appellate jurisdiction of the Supreme Court as follows:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.

It has sometimes been argued that the language of Article III compels Congress to vest the entire judicial power in some inferior Federal court.[57]

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[56] This Congressional power is also affirmed in Article I of the Constitution concerning the legislative power, which states:

> Section 8. The Congress shall have the Power. . .
> To constitute Tribunals inferior to the Supreme Court.

[57] Justice Story, in *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheaton) 304, 330-331 (1816), argued:

> Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if in any of the cases enumerated in the constitution, the state courts did not then possess jurisdiction the appellate jurisdiction of the Supreme Court ... could not reach those cases, and, consequently, the injunction of the constitution, that the judicial power "shall be vested" would be disobeyed. It would seem, therefore, to follow, that congress are

"(Continued)"

But the Supreme Court has consistently construed Congress' power over the jurisdiction of the lower Federal courts to be virtually plenary. In Cary v. Curtis,[58] for instance, the Court stated:

> ... the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good .... [T]he organization of the judicial power, in definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature.

Again in Kline v. Burke Construction Co.,[59] the Court stated:

> The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part ....

More particularly, Congress has engaged in a variety of actions with respect to the jurisdiction of the lower Federal courts, and those actions have consistently been upheld by the Supreme Court. Not until 1875, for instance, did Congress

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> bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance ... [T]he whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

See, also, Eisentrager v. Forrestal, 174 F. 2d 961 (D. C. Cir. 1949), reversed on other grounds sub nom. Johnson v. Eisentrager, 339 U.S. 763 (1950).

[58] 44 U.S. (3 Howard) 236, 245, (1845).

[59] 260 U.S. 226, 234 (1922).

vest the inferior Federal courts with general Federal question jurisdiction.[60] Moreover, the Supreme Court has consistently affirmed such Congressional actions over the jurisdiction of the lower Federal courts as (1) withdrawing jurisdiction even as to pending cases,[61] (2) delimiting lower Federal court jurisdiction over a particular cause of action to a single tribunal,[62] and (3) selectively withdrawing the jurisdiction of the lower Federal courts to adjudicate particular issues or to order particular remedies.[63]

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[60] 18 Stat. 470, Sec. 1 (Mar. 3, 1875). In 1801 Congress had briefly granted the inferior federal courts jurisdiction over "all cases in law and equity, arising under the Constitution and laws of the United States (2 Stat. 89, Sec. 11 (Feb. 13, 1801)), but a year later repealed that grant (2 Stat. 132 (Mar. 3, 1802)).

[61] *Bruner* v. *United States*, 343 U.S. 112 (1952) (amendment of statute concerning claims for service to U.S.—the Tucker Act--withdrawing federal district court jurisdiction over claims by employees as well as officers, without any reservation as to pending cases, requires dismissal of pending cases). See also *De La Rama Steamship Co., Inc.* v. *United States*, 344 U.S. 386 (1953) (general authority of Congress to withdraw federal court jurisdiction even as to pending cases affirmed, but General Savings Clause held to preserve pending claims in instant case).

[62] *E.g.*, the Emergency Price Control Act of 1942 (56 Stat. 23) required all challenges to the validity of regulations adopted to enforce it to be brought in a single Emergency Court and barred all other Federal, state, or territorial courts from asserting jurisdiction over such challenges. The decisions of the Emergency Court were reviewable in the Supreme Court. This unusual jurisdictional scheme was held to be within Congress' constitutional power in *Lockerty* v. *Phillips*, 319 U.S. 182 (1943) and *Yakus* v. *United States*, 321 U.S. 414 (1944). Similarly, the Voting Rights Act of 1965 (79 Stat. 437, 42 U.S.C. 1973) limited jurisdiction over proceedings to terminate the coverage of the Act in a particular area to a single court in the District of Columbia, and this was upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). See, also, the jurisdiction of the Temporary Emergency Court of Appeals as created by the Economic Stablization Act of 1970 (P.L. 91-379, 12 USC 1001) and as further defined in the Emergency Petroluem Allocation Act of 1973 (P.L. 93-159, 87 Stat. 628, 15 USC 751 *et seq.*) and the Energy Policy and Conservation Act of 1975. (P.L. 94-163, 89 Stat. 871).

[63] Modern examples include the Norris-La Guardia Act (47 Stat. 70, 29 USCA 101 *et seq.*), in which Congress restricted the jurisdiction of the Federal courts to issue restraining orders or temporary or permanent injunctions in labor disputes, upheld in *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323 (1938), and the Anti-Injunction Act (26 USCA 7421(a)), in which Congress barred all courts from entertaining suits to restrain the assessment or collection of any

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The Norris-LaGuardia Act,[64] perhaps the most celebrated modern example of Congress' exercise of its Article III powers, removed the jurisdiction of the lower Federal courts to issue a restraining order or an injunction in labor disputes. In upholding the Act's limitation, the Supreme Court in Lauf v. E.G. Shinner & Co.,[65] acknowledging that there is no constitutional right to a labor injunction, stated that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." Signficantly, however, the Court had in an earlier case ruled that State legislation which imposed similar restrictions on employers' remedies constituted a denial of due process.[66]

Even more restrictive than the Norris-LaGuardia Act was the Emergency Price Control Act of 1942,[67] which operated to limit both State and lower Federal court jurisdiction. Exclusive jurisdiction to determine the validity of any regulation, order, or price schedule was vested in a new Emergency Court of Appeals and even that court was denied power to issue any temporary restraining order or interlocutory decree. The Supreme Court upheld the Act in Lockerty v. Phillips,[68] recognizing that Congress could so limit the jurisdiction

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tax, most recently upheld in Bob Jones University v. Simon, 416 U.S. 725 (1974). Earlier examples include the Judiciary Act of 1789, in which Congress excepted from the lower Federal courts' diversity jurisdiction those cases in which diversity resulted from an assignment of a chose in action, upheld in Sheldon v. Sill, 49 U.S (8 Howard) 441 (1850) and an 1839 statute in which Congress disallowed suits in assumpsit in the Federal courts against the collectors of customs duties which allegedly were assessed unlawfully, upheld in Cary v. Curtis, supra.

[64] 29 U.S.C. 101-115.

[65] 303 U.S. 323, 330 (1938).

[66] Truax v. Corrigan, 257 U.S. 312 (1921).

[67] Emergency Price Control Act, ch. 26, 56 Stat. 23 (1942).

[68] 319 U.S. 182 (1943).

of the Federal courts under Article III. In Yakus v. United States,[69] the Court was faced with a more serious constitutional challenge to the Act in the context of a criminal prosecution for its violation. The defendant, who had been convicted by an enforcement court, claimed that the denial of a stay order during his appeal to the Emergency Court deprived him of due process. In rejecting this assertion, the Supreme Court stressed that "[t]here is no constitutional requirement that that test be made in one tribunal rather than another," and that the "award of an interlocutory injunction by courts of equity has never been regarded as a matter of right." Further, the Court seemed to suggest that Congress, in protecting the public interest, could impose some burdens on individual rights:

> If the alternatives, as Congress could have concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. [70]

The Health Programs Extension Act of 1973[71] is further support for Congress' power to eliminate lower Federal court jurisdiction with respect to remedies. Section 401(b) of the Act provides that the receipt of Federal funds by a hospital does not per se authorize "any court" to require such hospital to perform any sterilization procedure or abortion if such was contrary to the hospital's religious or moral convictions. In Taylor v. St. Vincent's Hospital,[72] an action was brought against the hospital claiming that it had violated plaintiff's constitutional rights by refusing her request to undergo a sterilization procedure.

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[69] 321 U.S. 414 (1944).

[70] 321 U.S. at 439.

[71] 42 U.S.C. 300a-7(a).

[72] 369 F. Supp. 948 (D. Mont. 1973), aff'd, 553 F. 2d 75 (9th Cir. 1975), cert. denied, 424 U.S. 948 (1976).

The district court held that it did not have jurisdiction to hear the action in view of the Act, basing its decision on the power of Congress to control both the jurisdiction and the remedies of the lower Federal courts.

> There can be no doubt that Section 401(b) which restricts the course and power of inferior federal courts is a valid exercise of Congressional power. Under Article III of the Constitution, Congress can establish such inferior courts as it chooses. Its power to create those courts includes the power to invest them with such jurisdiction as it seems appropriate for the public. [citation omitted]. Further, Congress is free to legislate with respect to remedies the inferior Federal courts may grant. [citations omitted]. 73/

Thus, the language of Article III, the history of past Congressional action, and judicial interpretation of Congress' power all appear to affirm that Congress has broad authority to impose limits on the jurisdiction of the lower Federal courts, and this may be particularly so where the limitation relates to the remedial rather than adjudicatory functions of the court. 74/ Although some cases have suggested that Congress' power over the jurisdiction of the lower Federal courts is limited by the taking clause of the Constitution 75/ or the due process requirement that persons not be denied all judicial

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73/ 369 F. Supp. at 951.

74/ See, e.g. Glidden v. Zdanok, 370 U.S. 530, 557 (1962) where the Supreme Court approved the power of Congress to limit the equitable remedies of the Court of Claims, stating that "[n]o question can be raised of Congress' freedom, consistently with Article III, to impose such a limitation upon the remedial powers of a federal court."

75/ In the Portal-to-Portal Act of 1947 (29 U.S.C. 251-262) Congress removed Federal court jurisdiction over suits claiming overtime compensation under the Fair Labor Standards Act for activities prior and subsequent to the principal employment activity of the day. The statute was a response to a Supreme Court decision which had held such activities as walking to and from employees's work stations, changing clothes, and cleaning up to be compensable under the FLSA. (Anderson v. Mt. Clemens Pottery Co. 328 U.S. 680). In the leading case of Battaglia v. General Motors Corporation, 169 F. 2d 254 (2d Cir.) cert. denied 335 U.S. 887 (1948), the U.S. Court of Appeals for the Second Circuit held the validity of that withdrawal of Federal court jurisdiction to depend on

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remedies to a claimed deprivation of a Federal right,[76] neither may be pertinent to S. 528. As in Lockerty and Yakus, the right of access to a forum where full relief may be obtained is not abrogated, it is merely reallocated. The State courts would remain open to litigants to press claims that student transportation beyond that permitted by the bill is necessary to adequately desegregate the school system. As long as a litigant is able to proceed in State court, a viable forum exists, and there is arguably no denial of due process. In this regard, the Supreme Court has stated that "Congress could, of course, have routed all Federal constitutional questions through the State court system, saving to this Court the final say when it came to review of the state court judgments."[77] In addition, the full range of remedies authorized by the Equal Educational Opportunities Act of 1974 would be available to the lower Federal courts in desegregation cases, including the use of student transportation to the extent authorized by the bill.

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the validity of Congress' redefinition of activities compensable under the FLSA:

> We think...that the exercise by Congress of its control over jurisidiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court it must not so exercise that power as to deprive any person of life, liberty, or property without just compensation. Thus, regardless of whether subdivision (d) of section 2 (withdrawing federal court jurisdiction) had an independent end in itself, if one of its effects would be to deprive appellants of property without due process or just compensation, it would be invalid. 169 F. 2d at 257.

Nonetheless, the court upheld the withdrawal of jurisdiction.

[76] See Cary v. Curtis, supra, (McLean, J., dissenting) and Yakus v. United States, supra.

[77] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

The bill's restrictions as they affect the appellate jurisdiction of the Supreme Court may be more problematic, however. Article III confines Congressional power over the appellate jurisdiction of the Supreme Court to the making of "Exceptions and. . .Regulations. . .," a power seemingly less complete on its face than Congress' power to "ordain and establish" the inferior courts. Indeed, it has even been suggested that the historical evidence surrounding the exceptions clause of Article III indicates that it should be read in light of the contemporary State practice to confine regulation basically to housekeeping matters and to certain proceedings where neither error or certiorari traditions had been available.[78] Additional uncertainty stems from the fact that since the Judiciary Act of 1789 Congress has made no attempt to sharply curtail the appellate jurisdiction of the Supreme Court, and thus the possible limits of its power have not been fully tested. This is particularly true with respect to Supreme Court review of State court decisions concerning Federal rights:

> [T]he Supreme Court has always had authority, under certain circumstances, to review a final judgment or decree of the highest court of a state in which a decision could be had, where. . .the judgment turns upon a substantial federal question. [80]

Nonetheless, numerous statements by the Supreme Court can be found describing Congress' power over its appellate jurisdiction in as broad a terms as those used to describe Congress' power over the jurisdiction of the inferior Federal courts. For example, in The "Francis Wright," Chief Justice Waite stated:

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[78] See, J. Goebel, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, p. 240 (P. Freund ed. 1971). Also, Merry, "Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis," 47 Minn. L. Rev. 53 (1962).

[79] 1 Stat. 73.

[80] Moore's Federal Practice, Vol. 1 (2d ed.), §0.6(6), pp. 252-53.

> ... while the appellate power of this Court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe .... What [the court's appellate powers] shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. 81/

Often cited as support for an expansive view of Congress' power to regulate the Supreme Court's appellate jurisdiction is the post Civil War

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81/ 105 U.S. 381, 385-6 (1881). In *Turner* v. *Bank of North America*, 4 U.S. (4 Dallas) 8, 10 (1799), Justice Chase stated the proposition thusly:

> The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise; and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the Federal Courts, to every subject, in every form, which the constitution might warrant.

Similarly, in *Daniels* v. *Railroad Company*, 70 U.S. (3 Wallace) 250, 254 (1865) the Court stated:

> The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.

See, also, *Durousseau* v. *United States*, 10 U.S. (15 Otto) 38 (1810).

decision in *Ex parte McCardle*.[82] In that case, under the authority of the Reconstruction Acts, the military government had imprisoned McCardle for publishing allegedly libelous and incendiary articles in his newspaper. He then brought a *habeus corpus* action alleging that the Reconstruction legislation was unconstitutional and, following an adverse decision below, filed a direct appeal to the Supreme Court under the then recently passed Act of February 5, 1867.[83] After the Court had acknowledged jurisdiction but before a decision on the merits, Congress withdrew the statutory right of appeal,[84] seeking to avoid a Supreme Court determination that the Reconstruction legislation was unconstitutional.[85] The Court then declined the appeal and dismissed the case for want of jurisdiction, finding that while its appellate jurisdiction "is, strictly speaking, conferred by the Constitution . . .it is conferred 'with such exceptions and under such regulations as Congress shall make'" according to Article III, Section 2.

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.[86]

Notwithstanding these assertions, however, some limitation may still attach to Congress' control of the Supreme Court's appellate jurisdiction.

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[82] 74 U.S. (7 Wallace) 506 (1868).

[83] Act of February 5, 1867, ch. 26, §1, 14 Stat. 385.

[84] Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

[85] See, generally, C. Fairman, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88*, pt. 1, at 433-514 (P. Freund ed. 1971).

[86] 74 U.S (7 Wallace) at 514.

In Ex parte McCardle itself and subsequently in Ex parte Yerger[87] the Court emphasized that the repeal of the 1867 statute did not deprive it of all appellate power over cases involving the constitutional right of habeas corpus:

> The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. [88]

That is, under the Judiciary Act of 1789 the Court had, prior to 1867, exercised the authority to review lower federal court decisions concerning habeas corpus, not by appeal but by a writ of certiorari. In Ex parte Yerger it was argued that the 1867 act authorizing direct appeals implicitly repealed the jurisdiction granted in the 1789 act, and that the subsequent repeal of the 1867 act deprived the Court of all appellate jurisdiction over habeas corpus proceedings. But the Court rejected the argument, stating:

> ...it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example.... it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.
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> These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. [89]

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[87] 75 U.S. (8 Wallace) 85 (1869).

[88] 74 U.S. (7 Wallace) at 515.

[89] 75 U.S. (8 Wallace) at 102-103.

The Court deemed the sudden withdrawal of jurisdiction in McCardle to be justified by "some imperious public exigency ... within the constitutional discretion of Congress to determine....[90] But it refused to construe the 1867 and 1868 statutes as withdrawing

> ...the whole appellate jurisdiction of this court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto....[91]

A principle implied by Article III and unaffected by McCardle is the separation of powers doctrine that may limit Congress in the exercise of its power to regulate Federal court jurisdiction. The requirement of an independent judiciary was directly addressed by the Court in a post-McCardle decision, United States v. Klein,[92] which concerned the effect to be given Presidential pardons of those who had aided and abetted the rebellion during the Civil War. The Captured and Abandoned Property Act authorized suit in the Court of Claims for the return of seized Confederate property on proof that the claimant had given no aid or comfort to the rebellion. In United States v. Padelford[93] the Supreme Court had ruled that the statute was satisfied when the claimant had received a pardon under a Presidential general amnesty. Thereafter Congress, while appeal in the Kline case was pending, enacted a rider to an appropriations bill providing that a Presidential pardon would not support a claim for captured property, that acceptance without disclaimer of a pardon for participation in the rebellion was conclusive evidence that the claimant had aided the enemy, and that when the

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[90] 75 U.S. (8 Wallace) at 104.

[91] 75 U.S. (8 Wallace) at 106.

[92] 80 U.S. (13 Wallace) 128 (1871).

[93] 76 U.S. (9 Wallace) 531 (1870).

Court of Claims based its judgment on such a pardon the Supreme Court lacked jurisdiction of the appeal.

In Klein, the Supreme Court held this statute unconstitutional as infringing the power of both the judiciary and the President. Although recognizing that Congress had the power under Article III to confer or withhold the right of appeal from the Court of Claims, the Court held that the proviso was not within "the acknowledged power of Congress to make exceptions and prescribe regulation to the appellate power" because it intruded upon the independence of the judicial branch and amounted to a "rule of decision, in causes pending, prescribed by Congress. . ."

> What is this [the act] but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants . . .Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not. . .We must think that Congress has inadvertently passed the limit which separates the legislative from judicial power. It is of vital importance that these powers be kept distinct. [94/]

The Klein decision, which was cited with approval by the Court in its 1962 ruling in Glidden Co. v. Zdanok,[95/] suggests that Congress must exercise its power to limit jurisdiction in a manner consistent with the independence of the judiciary.

[94/] 80 U.S. (13 Wallace) at 145-147. With respect to the powers of the Presidency, the Court found the pardoning power to be granted "without limit" to the Executive and held the Congressional provision to be an unconstitutional impairment of that independent power.

[95/] 370 U.S. 530 (1962).

Other cases suggest further possible limitations based on the supremacy clause of Article VI of the Constitution, which states:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It could be argued that this constitutional provision would be a nullity if there were not a single supreme tribunal with the authority to interpret and pronounce on the meaning of the Constitution and of Federal law. Thus, Justice Taney, in Ableman v. Booth, [96/] stated:

> But the supremacy thus conferred on this Government [by the supremacy clause] could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place...and the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that...a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, should be finally and conclusively decided...And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; [and] to make the Constitution and laws of the United States uniform, and the same in every State.... 97/

With even more dramatic flourish Justice Story justified Supreme Court review of State court decisions as follows:

96/ 62 U.S. (21 Howard) 506 (1858).

97/ 62 U.S. (21 Howard) at 517-18.

> A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution... [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils. 98/

In other words, a Supreme Court with authority to review and revise lower and State court judgments may be constitutionally necessary to assure the national uniformity and supremacy of the Constitution and federal law. 99/

Another argument related to the above stems from the due process clause. 100/ If appellate review by the Supreme Court were denied in cases involving a constitutional right, and if as a consequence different interpretations of the law developed in the various States or Federal judicial

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98/ Martin v. Hunter's Lesse, 14 U.S. (1 Wheaton) 304, 347-48 (1816).

99/ For fuller development of this argument, see Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," University of Pennsylvania Law Review 109: 157, 160-67 (1960). In Hart and Wechsler's famous dialogue on Congress' power over the jurisdiction of the Federal courts, the limitation asserted as to Congress' power over the Supreme Court's appellate jurisdiction is simply that "...the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Bator, Mishkin, Shapiro, and Wechsler, Hart and Wechsler's The Federal Courts and the Federal System , (2nd ed., 1973), p. 133.

100/ Sedler, "Limitations on the Appellate Jurisdiction of the Supreme Court," 20 University of Pittsburg Law Review 99, 113, 114 (1958).

circuits, then the effect would be unequal treatment of persons similarly situated. That is, persons asserting the same right would be treated differently in different jurisdictions. This result, it has been suggested, would be "a manifest abuse of due process, one of the bases of which is equal treatment before the law."[101] Thus, appellate review may be a necessary consequence of due process, "if such an appeal is necessary to secure uniform treatment before the law."[102]

Thus, the cases may provide less forceful precedent for the limitations imposed by S. 528 as they relate to the Supreme Court's appellate jurisdiction than the original jurisdiction of the inferior Federal courts. With the exception of McCardle, all of the cases have involved legislative limits on judicial authority with respect to claims arising from the common law or Federal statute. McCardle and Yerger, on the other hand, establish only that Congress can extinguish one means for obtaining appellate review of an asserted constitutional right when other means remain open, or conversely, that the courts will narrowly construe jurisdictional statutes when to do otherwise would have the effect of eliminating all remedies for a constitutional violation. In addition, Klein suggests that the Supreme Court may be less receptive to congressional mandates that intrude upon judicial independence by prescribing the manner in which the merits of a particular claim are to be viewed. Finally, fundamental constitutional limitations on Congress' power may derive from the Supreme Court's essential function in giving uniformity and national supremacy to Federal law or from due process demands that the enforcement of constitutional rights not depend on geographical location in the United States. But because of the infrequency with which Congress has acted to limit the Court's appellate jurisdiction in the past, and the consequent dearth of case law, the contours of Congress' power remain largely undetermined.

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[101] Id., at 113.

[102] Id., at 114.

It could be argued, however, that these constraints on Congress' power lose some of their force given the nature of the limitations imposed by the bill. That is, the bill would affect the Supreme Court's appellate jurisdiction only with respect to the implementation of certain school desegregation remedies, but would not otherwise restrict its authority to review the constitutionality of school officials' actions alleged to deny equal protection of the laws, or to order such other relief as may be appropriate to remedy any violation found to exist. This relief could even include the busing of students to the extent authorized by the bill. In addition, relief beyond that available in the Federal courts could be obtained by litigants in State courts which would remain open to school desegregation suits. The Supreme Court decisions in Swann and its progeny would continue to stand as controlling precedent in this area, presumably binding on State court judges as they ruled in related cases. In this regard, one noted commentator has suggested:

> There is, to be sure, a school of thought that argues that 'exceptions' has a narrow meaning, not including cases that have constitutional dimension; or that the supremacy or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts--which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as 'the supreme Law of the Land. . .any Thing in the Constitution or laws of any State to the Contray notwithstanding.' Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of the government. They do so rather for the reason that they must decide a litigated

> issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. This is, at least, what Marbury v. Madison was all about. I have not heard that it has yet been superceded, though I confess that I read opinions on occasion that do not exactly make its doctrine clear. 103/

Supporting Professor Wechsler's view is the fact that the Supremacy Clause and uniformity arguments sanctioned by the Court in Martin v. Hunter's Lessee (supra) and other early cases were based on an interpretation of the jurisdiction affirmatively granted or recognized by Congress in the Judiciary Act of 1789. Whether these arguments would have independent constitutional force against a Congressional denial of jurisdiction has yet to be adjudicated.

A final consideration that may affect the constitutionality of the bill under Article III is the separation of powers limitation enunciated in Klein. The Klein principle, precluding attempted congressional interference with the judiciary in the decision of pending cases, could have implications for the bill's limitations on judicial use of busing remedies. This may be particularly so as applied in suits by the Attorney General under §4 to reopen previously decided cases for retroactive enforcement of those remedial limits. Indeed, even more compelling reasons may support invocation of the Klein doctrine in the latter circumstances since it could be argued that Congress is attempting to alter or postpone the equitable effect of prior court decrees, and because of the heavy burden the duty to relitigate would place on the judicial process. In Pope v. United States,104/ the Supreme Court declined to decide under what conditions the Klein holding also prohibits a congressional act from setting aside a judgment in a case already decided. "We do not consider

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103/ Wechsler, "The Courts and the Constitution," 65 Columbia L. Rev. 1001, 1005-6 (1965).

104/ 323 U.S. 1, 8-9 (1944).

just what application the principles announced in the Klein case could rightly be given to a case in which Congress sought, pendente lite, to set aside a judgment of the Court of Claims in favor of the Government and require relitigation of the suit." However, the Court's recent decision in United States v. Sioux Nation of Indians[105] suggests that the mere fact that a congressional enactment requires relitigation of a previously decided case may not violate the separation of powers doctrine provided that the act is otherwise within Congress' constitutional powers.

Sioux Nation involved an act passed by Congress in 1978 waiving the res judicata effect of a prior judicial decision which had rejected a claim that Congress' 1877 ratification of an agreement ceding the Great Sioux Reservation, including the Black Hills, in violation of the Fort Laramie Treaty of 1868, effected a taking of Sioux lands without due process. The 1978 Act directed the Court of Claims to review de novo the merits of the Black Hill's taking claims without regard to the defense of res judicata. In holding that the statutorily mandated duty to relitigate the Sioux claims did not violate the doctrine of separation of powers, Justice Blackmun wrote for the Court:

> When Congress enacted the amendments directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were in pursuit of judicial enforcement of a new legal right. Congress had not 'reversed' the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of

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[105] 48 U.S.L.W. 4960 (S.Ct. 6/24/80).

> the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments. 106/

The legislation upheld in the Sioux Nation case, however, may be distinguishable from S. 528 in several relevant particulars. First, as observed by Justice Blackmun, the Act there did not purport to resolve the outcome of the Court of Claims new review of the merits of the claim. The remedial limits imposed by the bill, on the other hand, may be outcome determinative in the sense of requiring a court to devise a new remedy utilizing less student busing than previously ordered. Secondly, Sioux Nation involved a claim against the United States and the Court found that the 1978 Act was a valid exercise of Congress' power to condition waivers of sovereign immunity of the United States. Finally, Justice Blackmun also found that the waiver of res judicta was within Congress' power under §8 of Article I of the Constitution to provide for payment of the Nation's debts. Accordingly, it is possible that the Court would take a different view with respect to retroactive application of the busing limitations in S. 528.

Related to Klein is a principle implied by several early decisions that the Article III guarantee of an independent judiciary prevents the legislature and the executive from reviewing a judicial decision. 107/ Chief Justice Taney,

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106/ 49 U.S.L.W. at 4970.

107/ E.g. Hayburns Case, 2 U.S. (2 Dallas) 408 (1792); Gordon v. United States, Appendix I, 117 U.S. 697 (1885); Muskrat v. United States, 219 U.S. 346, 354 (1911) (citing Chief Justice Taney's draft opinion as one of "great learning"). See, also Schneiderman v. United States, 320 U.S. 118, 168-9 (1943) where Rutledge, J., concurring, commented that Congress does not have authority both to confer jurisdiction and to nullify the effects of its exercise by other jurisdictional provisions in the same statute.

for instance, argued in *Gordon* v. *United States* that the award of a remedy is an essential part of the exercise of judicial power and that rendering a judgment and yet having the remedy subject to Congressional approval is not an exercise of Article III power.[108] In *Chicago & Southern Airlines* v. *Waterman Steamship Corp.*,[109] the Court adopted similar reasoning to deny judicial review of a presidentially reviewable order of the Civil Aeronautics Board on the ground that such dual review would violate Article III. In strong language, Justice Jackson observed that:

> Judgments within the powers vested in the courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.[110]

Therefore, it is possible that in permitting the Supreme Court to review constitutional determinations in school desegregation cases, but denying it authority to order certain remedies, Congress may be acting beyond its powers under Article III.

Charles Dale

Charles Dale
Legislative Attorney
American Law Division
May 7, 1981

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[108] Chief Justice Taney's last judicial writing stated:

> Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without remedy . . .unless Congress should at such future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction; yet it is the whole power that the Court is allowed to exercise under this act of Congress. 117 U.S. at 702.

[109] 333 U.S. 103 (1948).

[110] 333 U.S. at 113-114.

COBB, EDWARDS, NICHOL, WOODALL & KELLY
ATTORNEYS AT LAW
A PROFESSIONAL ASSOCIATION

CHARLES P. COBB
ELWOOD L. EDWARDS
W. LYTLE NICHOL IV
DALE WOODALL
ERNEST G. KELLY, JR
MICHAEL C. WILLIAMS
ALLEN C. DUNSTAN
DAVID COBB SCRUGGS
E. WOODS WEATHERSBY
ANDREW H. RAINES

REPLY TO: ☒
900 MEMPHIS BANK BUILDING
MEMPHIS, TENNESSEE 38103
901-525-6781

REPLY TO: ☐
5885 HYATT RIDGEWAY PARKWAY
MEMPHIS, TENNESSEE 38138
901-682-2844

MARION G. EVANS
1877-1957
JACK PETREE
1911-1973

May 13, 1981

MAY 8 1981

Mr. J. Bennett Johnston
Unites States Senator
United States Senate
Washington, D.C. 20510

Dear Mr. Johnston:

Thank you for your recent letters. As I told Mr. Richard, I would be happy to supply some examples from our own situation illustrating some of the problems which arise when a busing plan is indefinitely protracted.

By way of background, we had a final plan of desegregation adopted by the District Court and implemented in the fall of 1973. This plan involved extensive busing, although the plaintiffs in our case were aggrieved that it did not go further and attempt to desegregate a considerable number of additional predominantly black schools in the inner city. Their appeals on this issue were rejected by the Sixth Circuit and certiorari was denied by the Supreme Court.

Since the implementation of the plan, we have seen extensive white flight in Memphis and have also seen considerable residential change in a number of areas which were almost entirely white at the time the plan was adopted. We have made various efforts to modify the busing plan to take into account these intervening changes in pupil population. In 1976 we had considerable success, but in a 1977 hearing, the District Court did a marked about face from its 1976 decision. Since the 1977 decision, we have continued to live with a number of circumstances where we are transporting black students between majority black schools, and even with situations where we are taking black students out of a desegregated school and busing them back to an overwhelmingly black situation.

By way of illustration, I am enclosing the Court's encouraging decision of 1976 and also the 1977 decision which largely closed the door to further court ordered modifications in the plan. One of the results of the 1977 hearing was to continue to require that students in rapidly desegregating areas known as Frayser and Whitehaven continue to be bused into the inner city, thereby aggrevating white flight out of desegregating neighborhoods and, perhaps, contributing to residential instability.

By way of specific examples, students in grades 7 through 9 were being transported out of a desegregating Frayser neighborhood back to Manassas Jr. High School which was 95% black. The home schools from which these pupils were being taken were 49% black and 41% black, but the students were still required to leave these desegregated Frayser schools and be bused to a more remote location. Ironically, 23 of the 55 students thus transported were themselves black students being taken back to a school in the inner city.

A similar example occurred at Humes Jr. High School where another satellite area from the desegregating Frayser neighborhood carried 35 black and 33 white students away from their home school into Humes Jr. High School. At that time, Humes had a black population of 91% and the home school - Westside Jr. - had a black population of 44%.

An example from the Whitehaven area was the transportation of 27 black and 17 white students out of a majority black home situation at Hillcrest and into an inner city high school - South Side. The result was that these students, including a majority of black students, were transported away from a 57% home school and into a 99% black inner city school. Despite the apparent futility of such transportation, the Court denied the Board's motion to modify the plan and allow the students to stay at their desegregated neighborhood schools.

Based on our experience, it seems to me that there are two major frustrations which arise in the years following the implementation of a busing plan - in addition to the initial frustrations growing out of the cost, ineffectiveness, and personal hardships of busing in general. The first of these frustrations is the difficulty of doing away with failed portions of the plan where busing has ceased to serve the purposes of desegregation and has simply become busing for the sake of busing. The second frustration is that the busing remedy, unlike other race-conscious remedies, has not been treated by the Courts as a temporary remedy which moves the defendant in the direction of a final state of genuine nondiscrimination. In fair employment cases, for example, a defendant whose work force has been illegally segregated may be required to undertake race-conscious hiring practices. He does so, however, with the knowledge that at some point he will achieve a sufficient degree of balance in his work force so that the race-conscious remedy can be abandoned and genuine nondiscrimination established. The busing remedy holds out no such long term hope. It does not address itself to patterns of segregated housing which created the problem in the first place, and in fact tends to have an adverse impact on the type of housing desegregation which could ultimately create natural desegregated neighborhood schools. This occurs when communities such as Frayser and Whitehaven are subjected to a double loss of white students owing to white flight from busing at the same time that they are experiencing residential transition in the neighborhood. We have a number of schools in these areas which might have become desegregated on the basis of changing neighborhood patterns but which became almost entirely black as a result of the combined effect of residential change and busing to other areas.

Two examples among many are the Winchester and Gardenview schools in the Whitehaven area, and I am enclosing enrollment statistics showing the history of those schools since the beginning of the desegregation plan in 1973.

I appreciate the opportunity which you given for some imput into the current consideration of legislative standardization of the busing issue.

Yours very truly,

COBB, EDWARDS, NICHOL, WOODALL & KELLY

Ernest Kelly, Jr.

Ernest G. Kelly, Jr.

EGKJr/alr

Encl:

(Remarks of Sam J. Ervin, Jr., Morganton, N. C.)

JUDICIAL VERBICIDE: AN AFFRONT TO THE CONSTITUTION

Judicial Verbicide

Jim's administrator was suing the railroad for his wrongful death. The first witness he called to the stand testified as follows: "I saw Jim walking up the track. A fast train passed, going up the track. After it passed, I didn't see Jim. I walked up the track a little way and discovered Jim's severed head lying on one side of the track, and the rest of his body on the other." The witness was asked how he reacted to his gruesome discovery. He responded: "I said to myself something serious must have happened to Jim."

Something serious has been happening to constitutional government in America. I want to talk to you about it.

My motive for doing so is as lofty as that which caused Job Hicks to be indicted and convicted of disturbing religious worship in the Superior Court of Burke County, North Carolina, my home county, 75 years ago.

Job revered the word of the Lord. An acquaintance of his, John Watts, took a notion he had been called to preach the Gospel, and adopted the practice of doing so in any little country church which would allow him to occupy its pulpit. While he was well versed in his profession as a brick mason, John Watts was woefully ignorant in matters of theology.

One Sunday, Job Hicks imbibed a little too much Burke County corn liquor, a rather potent beverage. After so doing, he walked by a little country church, saw John Watts in the pulpit, and heard him expounding to the congregation his peculiar version of a Biblical text. Job Hicks entered the church, staggered to the pulpit, grabbed John Watts' coat collar, dragged him to the door, and threw him out of the church.

When the time came for the pronouncement of the sentence upon the jury's verdict of guilty, Judge Robinson, the presiding judge, observed: "Mr.

Hicks, when you were guilty of such unseemly conduct on the Sabbath Day, you must have been too drunk to realize what you were doing." Job Hicks responded: "It is true, Your Honor, that I had had several drinks, but I wouldn't want Your Honor to think I was so drunk that I could stand by and hear the Word of the Lord being mummicked up like that without doing something about it."

Although I am completely sober, I am constrained to confess I am like Job Hicks in one respect. I cannot remain silent while the words of the Constitution are being mummicked up by Supreme Court Justices.

This is so because I entertain the abiding conviction that the Constitution is our most precious heritage as Americans. When it is interpreted and applied aright, the Constitution protects all human beings within our borders from tyranny on the one hand and anarchy on the other. William Evart Gladstone, the wise English statesman, correctly described it as the most wonderful work ever struck off at a given time by the brain and purpose of man.[1]

I entitle my remarks "Judicial Verbicide: An Affront To the Constitution". I am prompted to do so by this trenchant truth which was told by Dr. Oliver Wendell Holmes in his Autocrat of the Breakfast Table:

> "Life and language are alike sacred. Homicide and verbicide -- that is -- violent treatment of a word with fatal results to its legitimate meaning, which is its life -- are alike forbidden."[2]

Why The Constitution Was Framed And Ratified

The term "Founding Fathers" is well designed to describe those who framed and ratified the Constitution and its first ten amendments. For ease of expression, I also apply it to those who framed and ratified subsequent amendments.

The Founding Fathers knew the history of the struggle of the people against arbitrary governmental power during countless ages for the right to self rule and freedom from tyranny, and understood the lessons taught that history.

As a consequence they knew these eternal truths: First, th government is not a government of laws is a despotism, let it be call may;"[3] second, that occupants of public offices love power and are pr abuse it;[4] and, third, that what autocratic rulers of the past had the past might be attempted by their new rulers in the future unless restrained by laws which they alone could neither alter nor nullify.[5]

The Founding Fathers desired above all things to secure to in a written Constitution every right which they had wrested from aut rulers while they were struggling for the right to self rule and free tyranny.

Their knowledge of history gave them the vision to know th objective could be accomplished only in a government of laws, i.e., a which rules by certain, constant, and uniform laws rather than by the uncertain, and inconstant wills of impatient men who happen to occup fleeting moment of time legislative, executive, or judicial offices.

What The Constitution Was Designed To Accomplish

For these reasons, the Founding Fathers framed and ratified Constitution, which they intended to last for the ages, to constitute for both rulers and people in war and in peace, and to cover with the of its protection all classes of men with impartiality at all times a all circumstances.[6]

While they intended it to endure for the ages as the natio instrument of government, the Founding Fathers realized that useful of some of its provisions would be suggested by experience.[7]

Consequently, they made provision for its amendment in one way and one way only, i.e., by combined action of Congress and the States as set forth in Article V. By so doing, they ordained that "nothing new can be put into the Constitution except through the amendatory process" and "nothing old can be taken out without the same process;"[8] and thereby forbade Supreme Court Justices to attempt to revise the Constitution while professing to interpret it.[9]

In framing and ratifying the Constitution, the Founding Fathers recognized and applied an everlasting truth embodied by the British philosopher, Thomas Watts, in this phrase: "Freedom is political power divided into small fragments."

They divided all governmental powers between the Federal Government and the States by delegating to the former the powers essential to enable it to operate as a national government for all the states, and by reserving to the states all other powers.

They divided among the Congress, the President, and the Federal judiciary the powers delegated to the federal government by giving Congress the power to make federal laws, imposing on the President the duty to enforce federal laws, and assigning to the federal judiciary the power to interpret federal laws for all purposes and state laws for the limited purpose of determining their constitutional validity.

In making this division of powers, the Founding Fathers vested in the Supreme Court as the head of the Federal judiciary the awesome authority to determine with finality whether governmental action, federal or state, harmonizes with the Constitution as the supreme law of the land, and mandated that all federal and state officers, including Supreme Court Justices, should be bound by oath or affirmation to support the Constitution.[10]

The Founding Fathers undertook to immunize Supreme Court Justices against temptation to violate their oaths or affirmations to support the

Constitution by making them independent of everything except the Constitution itself. To this end, they stipulated in Article III that Supreme Court Justices "shall hold their offices during good behaviour * * and receive for their services a compensation, which shall not be diminished during their continuance in office."

In commenting upon the obligation of Supreme Court Justices to check unconstitutional action in his dissenting opinion in United States v. Butler, Justice (afterwards Chief Justice) Stone made this cogent comment: "While unconstitutional exercise of power by the executive and legislative branches of government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."[11]

Wise Americans Condemn Judicial Activism And Verbicide

Some exceedingly wise Americans, who understood and revered the Constitution, have expressed opinions concerning Justices who do not exercise the self-restraint which their oaths or affirmations to support the Constitution impose upon them, and the impact of their derelictions upon constitutional government.

George Washington, who served as President of the Convention that framed the Constitution before becoming our first President under it, gave America this solemn warning in his Farewell Address:

> "If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

Chief Justice Marshall emphasized the supreme importance of a Supreme Court Justice accepting the Constitution as the absolute rule for the government of his official conduct by declaring that if he does not discharge his duties agreeably to the Constitution his oath or affirmation to support that instrument "is worse than solemn mockery."[12]

Another great constitutional scholar, Judge Thomas M. Cooley, asserted that such a Justice is "justly chargeable with reckless disregard of official oath and public duty."[13]

Benjamin N. Cardozo, Chief Judge of the New York Court of Appeals and Justice of the United States Supreme Court, stated in The Nature of the Judicial Process that "judges are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom" and that "it would put an end to the reign of law" if judges adopted the practice of substituting their personal notions of justice for rules established by a government of laws.[14]

Constitutional Obligations Of Supreme Court Justices

No question is more crucial to America than this: What obligation does the Constitution impose upon Supreme Court Justices?

America's greatest jurist of all time, Chief Justice John Marshall, answered this question with candor and clarity in his opinions in Marbury v. Madison and Gibbons v. Ogden.[15] In these indisputably sound opinions, Chief Justice Marshall declared:

1. That the principles of the Constitution are designed to be permanent.

2. That the words of the Constitution must be understood to mean what they say

3. That the Constitution constitutes an absolute rule for the government of Supreme Court Justices in their official action.

In elaborating the second declaration, Marshall said:

> "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."[16]

Judicial Activism and Verbicide

Judges who perpetrate verbicide on the Constitution are judicial activists. A judicial activist is a judge who interprets the Constitution to mean what it would have said if he instead of the Founding Fathers had written it.

Contrary to popular opinion, all judicial activists are not liberals. Some of them are conservatives. A liberal judicial activist is a judge who expands the scope of the Constitution by stretching its words beyond their true meaning, and a conservative judicial activist is one who narrows the scope of the Constitution by restricting their true meaning.

Judicial activism of the right or the left substitutes the personal will of the judge for the impersonal will of the law.

The majority opinion in Miranda v. Arizona is the product of liberal judicial activism, and the majority opinion in Laird v. Tatum is the product of conservative judicial activism.[17]

Judges are fallible human beings. The temptation to substitute one's personal notions of justice for law lies in wait for all occupants of judicial offices, and sometimes ordinarily self-restrained judges succumb to it.

Nobody doubts the good intentions of the judicial activists. They undoubtedly lay the flattering unction to their souls that their judicial activism is better than the handiwork of the Founding Fathers, and that America will be highly blessed by an exchange of the constitutional government ordained by the Constitution for a government embodying their personal notions.

Before accepting these assurances as verity Americans would do well to ponder what Daniel Webster said about public officials who undertake to substitute their good intentions for rules of law. Webster said:

> "Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters."

Alexander Hamilton's Assurance Concerning Judicial Activism And Verbicide

When the Constitutional Convention of 1787 submitted the Constitution to the States, Eldridge Gerry, who had been a delegate from Massachusetts, and George Mason, who had been a delegate from Virginia, opposed its ratification because it contained no provision sufficient to compel Supreme Court Justices to obey their oaths or affirmations to support it.

Gerry complained that, "There are not well defined limits to the judiciary powers" and that "it would be a herculean labour to attempt to describe the dangers with which they are replete."

George Mason said that "the power of construing the laws would enable the Supreme Court of the United States to substitute its own pleasure for the law of the land and that the errors and usurpations of the Supreme Court would be uncontrollable and remediless."

Alexander Hamilton, a delegate from New York, rejected these arguments with the emphatic assertion that "the supposed danger of judiciary encroachments * * * is, in reality, a phantom."

To support his assertion, Hamilton maintained in much detail that men selected to sit on the Supreme Court would be chosen with a view to those qualifications which fit men for the stations of judges, and that they would give that inflexible and uniform adherence to legal rules and precedents which is indispensable in courts of justice.[18]

By his remarks, Hamilton assured the several states that men selected to sit upon the Supreme Court would be able and willing to subject themselves to the restraint inherent in the judicial process.

Experience makes this proposition indisputable: Although one may possess a brilliant intellect and be actuated by lofty motives, he is not qualified for the station of judge in a government of laws unless he is able and willing to subject himself to the restraint inherent in the judicial process.

Fruits of Judicial Activism and Verbicide

Hamilton's prediction about the qualifications of the men to be selected to serve as Supreme Court Justices proved valid for generations. Unfortunately, however, for constitutional government in America, Hamilton's phantom has now become an exceedingly live ghost.

While they have acted with reasonable judicial decorum in ordinary cases, the tragic truth is that during recent years some Supreme Court Justices have adopted and exercised the role of judicial activists with more or less abandon in cases involving the place of the states in the federal system, cases involving prosecution for crimes in federal and state courts, and cases having emotional, political, and racial overtones.

A high proportion of these cases have been decided by a sharply divided Court. Limitations of language and time compel me to confine my remarks in respect to them to the handiwork of the Supreme Court Justices who have enacted the role of judicial activists and to omit reference to that of their brethren whose vigorous dissents have protested such actions.

By committing verbicide on the Constitution, the judicial activists concentrate in the federal government powers the Constitution reserves to the states; diminish the capacity of federal executive officers and the states to bring criminals to justice; rob individuals of personal and property rights; and expand their own powers and those of Congress far beyond their constitutional limits.

In Milton's poetic phrase, the cases in which the Supreme Court has committed *verbicide* upon the Constitution have become as "thick as autumnal leaves that strow the brooks of Vallombrosa."[19]

The number and variety of these cases make it impossible to detail them within appropriate limits. If anyone should detail them in their entirety, he would be justly chargeable with forsaking time and encroaching upon eternity.

Merely to indicate how judicial verbicide performs its wonders, I cite a few of the innovative decisions an activist Supreme Court has handed down since 1968. They are *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409; *Sullivan v. Little Hunting Park*, 396 U.S. 229; *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431; *Johnson v. Railway Express Agency*, 421 U. S. 454; *Runyon v. McCrary*, 427 U.S. 160; and *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273.

By committing colossal verbicide on the plain words of the Thirteenth Amendment and the Civil Rights Act of 1866, Supreme Court Justices have assigned to themselves and Congress powers to dominate and punish the private thoughts, the private prejudices, and the private business and social activities of Americans which are repugnant to the powers given them by the Constitution.

A Chorus of Protest Against Judicial Activism and Verbicide

In charging in Chief Justice John Marshall's unhappy phrase that some Supreme Court Justices are making a solemn mockery of their oaths to support the Constitution, I am not a lone voice crying in a constitutional wilderness. I am, in truth, simply one member of a constantly expanding chorus.

Judge Learned Hand, Alexander Bickel, Philip B. Kurland, and other profoundly enlightened constitutional scholars have made similar accusations. These charges are corroborated in detail by these recent books: Government By Judiciary, by Rauol Berger; The Price of Perfect Justice, by Macklin Fleming; and Disaster By Decree, by Lino A. Graglia. Besides the apostacy of the activist Justices to the Constitution is highlighted in numerous vigorous dissents by their brethren on the Supreme Court bench.

One of the most lucid comments on the judicial verbicide of activist Supreme Court Justices is that of Justice Jackson in his concurring opinion in Brown v. Allen, 344 U. S. 443, 542-550, In deploring the perverted use of the great writ of habeas corpus to rob the verdicts and judgments of state courts in criminal trials of any finality, Justice Jackson said:

> "Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles."

Justice Jackson closed his observations on judicial verbicide with this sage comment:

> "I know of no way we can have equal justice under law except we have some law."

Excuses For Judicial Activism and Verbicide

Candor compels the confession that many Americans commend the usurpations of the activist Justices, especially when they harmonize with their wishes.

These erring ones seek to coerce critics of judicial activism into silence. To this end, they assert that all Supreme Court decisions are entitled to respect, and that those who criticize any of them are unpatriotic.

This assertion is contemptuous of the wisdom of the Founding Fathers in incorporating in the First Amendment for the benefit of all Americans guarantees of freedom of speech and the press. Besides, it is downright silly.

Like other official action, judicial decisions merit respect only when they are respectable, and no decision of the Supreme Court is respectable if it flouts the Constitution its makers have obligated themselves by oath or affirmation to support.

As Justice Felix Frankfurter so rightly declared: "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. * * * Judges must be kept mindful of their limitations and their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."[20]

Chief Justice Stone concurred with Justice Frankfurter's view by stating that "where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action, and fearless comment upon it."[21]

Apologists for the verbicial attacks of Supreme Court Justices upon the Constitution attempt to justify them by these arguments:

1. They are necessary to keep government abreast of the time because the amendatory process established by Article V is too cumbersome and dilatory.

2. They are desirable because they make pleasing amendments to the nation's supreme law which Congress and the states are unwilling to make.

3. They prove that the Constitution is a living instrument of government.

The Invalidity of the Excuses

There are two incontestable answers to these arguments in their entirety. They are first, that tyranny on the bench is as reprehensible as tyranny on the throne; and, second, that the ultimate result of judicial activism on the part of the Supreme Court Justices is the destruction of the government of laws the Constitution was ordained by the people to create and preserve.

There are also separate irrefutable answers to each of the arguments.

As James Madison, the Father of the Constitution, stated, the Founding Fathers created the amendatory process of which the apologists complain to ensure that Congress and the states will act with deliberation when they consider proposed changes in the Constitution and will refrain from acting unwisely in making them.

The Founding Fathers knew that a Constitution is destitute of value if its provisions are as mutable as simple legislative enactments,[22] and they certainly did not intend that decisions of constitutional questions by the Supreme Court should ever be rightly compared as they were by Justice Roberts in a colorful phase with restricted railroad tickets, good for this day and train only.[23]

The second argument of the apologists is the stuff of which tyranny is made. Its underlying premise is their apprehension that Congress and the states acting in combination may have too much wisdom to amend the Constitution in ways pleasing to them. Hence, they maintain that for their pleasure Supreme Court Justices ought to usurp and exercise the power the Constitution vests exclusively in the people to have the Constitution amended only by the representatives they choose to act for them at Congressional and state levels.

The usurpation of this power by Supreme Court Justices does not prove that the Constitution is a living instrument of government. On the contrary, it proves that the Constitution is dead, and that the people of our land are being ruled by the transitory personal notions of Justices who occupy for a fleeting moment of history seats on the Supreme Court bench rather than by the enduring precepts of the Constitution.

Despite *Miranda's* disapproval of confessions, I am going to make an honest one.

Those who abhor tyranny on the bench as much as tyranny on the throne are unable to devise any pragmatic procedure to compel activist Judges to observe their oaths or affirmations to support the Constitution.

Judicial aberrations are not impeachable offenses under Article II, Section 4. No earthly power can compel activist Justices to exercise self-restraint if they are unable or unwilling to do so, and the soundest criticism is not likely to deter activist Justices from their activism and verbicide when they honestly believe their handiwork is better than that of the Founding Fathers. It is obvious, moreover, that Congress and the states cannot protect constitutiona government adequately by adding new amendments to the Constitution. This is true for these reasons: First, it is folly to expect activist Justices to obey new constitutional provisions when they spurn the old; and, second, it would complicat simplicity and convert the Constitution into a confusing document as long as the Enclyclopaedia Britiannica to rid us of all the judicial usurpations of recent years.

Conclusion

All history proclaims this everlasting truth: No nation can enjoy the right to self-rule and the right to freedom from tyranny under a government of men. The Founding Fathers framed and ratified the Constitution to secure these precious rights to Americans for all time.

Judicial verbicide substitutes the personal notions of judges for the precepts of the Constitution. Hence, judicial verbicide is calculated to convert the Constitution into a worthless scrap of paper and to replace our government of laws with a judicial oligarchy.

A great Senator, Daniel Webster, warned America in eloquent words what the destruction of our Constitution would entail. He said:

> "Other misfortunes may be borne, or their effects overcome. If disastrous wars should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury, future industry may replenish it; if it desolate and lay waste our fields, still, under a new cultivation, they will grow green again, and ripen to future harvests.

"It were but a trifle even if the walls of yonder Capitol were to crumble, if its lofty pillars should fall, and its gorgeous decorations be all covered by the dust of the valley. All of these may be rebuilt.

"But who shall reconstruct the fabric of demolished government?

"Who shall read again the well-proportioned columns of constitutional liberty?

"Who shall frame together the skillful architecture which unites national sovereignty with State Rights, individual security, and public prosperity?

"No, if these columns fall, they will be raised not again. Like the Colisseum and the Parthenon, they will be destined to a mournful and melancholy immortality. Bitterer tears, however, will flow over them than ever were shed over the monuments of Roman or Grecian art; for they will be the monuments of a more glorious edifice than Greece or Rome ever saw -- the edifice of constitutional American Liberty."

In closing, I reiterate some inescapable conclusions.

The distinction between the power to amend the Constitution and the power to interpret it is as wide as the gulf which yawns between Lazarus in Abraham's bosom and Dives in hell. The power to amend is the power to change the meaning of the Constitution, and the power to interpret is the power to determine the meaning of the Constitution as established by the Founding Fathers.

The Founding Fathers did not contemplate that any Supreme Court Justice would convert his oath or affirmation to support the Constitution into something worse than solemn mockery. On the contrary, they contemplated that his oath or affirmation to support that supreme instrument of government would implant indelibly in his mind, heart, and conscience a solemn obligation to be faithful to the Constitution.

A Justice who twists the words of the Constitution awry under the guise of interpreting it to substitute his personal notion for a constitutional precept is contemptuous of intellectual integrity. His act in so doing is as inexcusable as that of the witness who commits perjury after taking an oath or making an affirmation to testify truthfully.

We must not despair because there is no way by which law can compel activist Supreme Court Justices to subject their personal wills to the precepts of the Constitution.

This is true because it is not yet unconstitutional for Americans to invoke divine aid when they are their wits' end.

Hence, we can pray -- hopefully not in vain -- that the activist Justices will heed the tragic truth spoken by Webster and their own oaths or affirmations to support the Constitution, and become born-again suppoerters of the most precious instrument of government the world has ever known.

NOTES

1. William Ewart Gladstone: Kin Beyond the Sea, North American Review, September-October, 1878.

2. Oliver Wendell Holmes: Autocrat of the Breakfast Table, (The Limited Editions Club 1955), Chapter I, page 9.

3. The Writings and Speeches of Daniel Webster, National Edition, Vol. 2, page 165

4. George Washington: Farewell Address.

5. Ex Parte Milligan, 4 Wall. (U.S.) 2, 120-121.

6. Ibid.

7. James Madison: The Federalist No. 43.

8. Frankfurter, J.: Ullman v. United States, 350 U.S. 422, 428.

9. Cardozo, C.J.: Sun Printing and Publishing Association v. Remington Paper and Power Company, 235 N.Y. 338, 139 N.E. 470. See, also, West Coast Hotel Co. v. Parrish, 300 U.S. 379, when Justice Sutherland stated in a dissent: "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'Supreme law of the land/ stands for and to convert what was intended as inexcapable and enduring mandates into mere moral reflections. If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation -- and the only true remedy -- is to amend the Constitution."

10. The United States Constitution.

11. United States v. Butler, 297 U.S. 1, 78.

12. Marbury v. Madison, 1 Cranch (U.S.) 137, 180.

13. Thomas M. Cooley: Constitutional Limitations, pages 88-89. See Volume 1, page 153, of the 8th Edition of this treatise where Judge Cooley makes this statement: "Whoever derives power from the Constitution to perform any public function is disloyal to that instrument, and grossly derelict in duty, if he does that which he is not reasonably satisfied the Constitution permits. Whether the power be legislative, executive, or judicial, there is a manifest disregard of the constitutional and moral obligation by one, who having taken on oath to observe that instrument, takes part in any action which he cannot say he believes to be no violation of its provisions."

14. Benjamin N. Cardozo: The Nature of the Judicial Process, p. 68, 136.

15. Marbury v. Madison, 1 Cranch (U.S.) 137, 175, 180; Gibbons v. Ogden, 9 Wheat. (U.S.) 1, 188.

16. Gibbons v. Ogden, 9 Wheat. (U.S.) 188.

17. Miranda v. Arizona, 384 U.S. 486; Laird v. Tatum, 408 U.S. 1.

18. Alexander Hamilton: The Federalist Nos. 78, 81.

19. John Milton: Paradise Lost, Book I, line 292.

20. Frankfurter, J., in Bridges v. California, 314 U.S. 252, 289-290.

21. Alpheus Thomas Mason: Harlan Fiske Stone, Pillar of the Law, (1968 edition) p. 398.

22. James Madison: The Federalist No. 43.

23. Roberts, J. in Smith v. Allwright, 321 U.S. 649, 669.

NATIONAL ASSOCIATION FOR NEIGHBORHOOD SCHOOLS, INC.

November 25, 1981

A CRITIQUE OF S.1760 (HATCH) AND S.1647 (EAST)

Overview

S.1760 (Hatch) was drafted in the Constitution Subcommittee of the Senate Judiciary Committee. S.1647 (East) was drafted in the Separation of Powers Subcommittee. Both bills have been reported out of the respective subcommittees for consideration by the full Senate Judiciary Committee. At this writing, planned companion legislation has not yet been introduced in the House.

Both bills are intended to strip the lower federal courts of the jurisdiction to order forced busing as a remedy in cases alleging school segregation. Both bills have the intent, although not stated in certain terms, of throwing such cases into state courts. Both bills are intended to provide relief for school districts already under federal court busing orders.

Both bills are built around Congressional powers under Article III section 1 of the Constitution (the power of Congress to set or limit the jurisdiction of lower federal courts) and Section 5 of the 14th Amendment to the Constitution ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article").

Both bills may be passed by simple majorities in both Houses, subject to the signature of the President. A presidential veto may be overriden by two-thirds vote in both Houses. These bills are not to be confused with a constitutional amendment.

A serious mutual failing

Neither bill takes the step of removing the appellate jurisdiction of the Supreme Court of the United States on the matter of forced busing and thus neglect the clear power of Congress to do so under Article III, section 2, clause 2 of the Constitution.

Thus, even with the passage of this legislation, the Supreme Court will be able to contimue to formulate busing orders. Cases heard in state courts will still be subject to Supreme Court review and efforts at the state level to inhibit state courts from ordering busing as a remedy (state constitutional amendments, legislation and binding referenda) will be seriously impaired or precluded. Given a failure by state courts or lower federal courts to order busing as a remedy or to maintain existing busing orders, the Supreme Court could still coerce such courts into doing so.

This failure has been a political decision. The feeling apparently is that with the appellate jurisdiction of the Supreme Court left intact, congressional passage of the legislation (and perhaps even acceptance of the legislation by the Reagan Administration) will be enhanced. Beyond this, the apparent feeling is that with its appellate jurisdiction to formulate busing orders left in place, the Supreme Court will be less inclined to arrogantly declare the legislation "unconstitutional" and a possible constitutional confrontation (which, by the way, is much needed) between the legislative and judicial branches will be avoided.

S.1760 (Hatch)

Under its Sect. 2, this bill begins with a long and impressive list of Congressional findings of fact on the failure and undesirability of forced busing. Included here is a finding that racial assignments of students "is itself an unjustifiable practice of racial discrimination by the Government in violation of the fourteenth amendment."

Section 3(a), (b)

S.1760 provides here a list of remedies available for unconstitutional school segregation except the assignment or exclusion of students because of their race or color. These remedies include legal injunctions suspending all implementation of a segregative law or other racially discriminatory government action; contempt of court proceedings where such injunctions are not scrupulously obeyed (Note: With these two provisions, the inventiveness of federal courts in manufacturing "constitutional violations" out of boundry line changes, school district reorganizations, feeder patterns, etc. would still be in place); programs without coercion or numerical quotas or specific goals based on racial balance that permit students to voluntarily transfer to other schools within the school district where they reside; advance planning in construction of new facilities to provide nondiscriminatory education within the students' neighborhood; and other local initiatives and plans to improve education for all students without regard to race (or) color.

This listing of allowable remedies except busing for racial balance is a plus for S.1760. S.1647 does not include such provisions. Thus, S.1760 conveys the clear message and intent of Congress that the legislation does not intend to prevent courts, both federal or state, from addressing illegal school segregation. The remedies are geared to equalizing educational opportunity, not social planning. They are a clear presentation of Congressional powers under Section 5 of the 14th Amendment. They are also a "message" to state courts.

However, given the past inventiveness, overreach and arrogance of the federal judiciary, the listing of remedies may provide a mechanism for judges to step around the intent of Congress. This is further discussed below.

(Section 4 is a statement of the sources of Congressional power to enact the legislation)

Section 5

Section 5(b)(1) removes the jurisdiction of lower federal courts to issue orders requiring the assignment or exclusion of students based on race or color.

S.1760 self-destructs

Section 5(b)(2) is the retroactive or re-opener section pertaining to school districts already under busing orders.

It is here that S.1760 "guts" itself as concerns its effect on existing orders. What begins as an excellent piece of anti-busing legislation now self-destructs by playing into the hands of pro-busing judges.

The bill provides here that districts already under busing orders can seek relief "in any court" from orders requiring, "directly or indirectly", the racial assignment or exclusion of students and shall be entitled to such relief "unless that court can make conclusive findings based on clear and convincing evidence that -"

1. the acts bringing about the order "intentionally and specifically caused" and would so continue to cause students to be assigned or excluded from schools on the basis of race and were not "legitimate efforts to employ public education resources to meet public education needs without regard to race..."
2. "the totality of circumstances have not changed since issuance of the order to warrant reconsideration of the order."
3. "no other remedy (including those in Sect. 3) would preclude the intentional and specific segregation."
4. "the economic, social and educational benefits of the order have outweighed the economic, social and educational costs of the order."

Although the bill does not say so specifically, its drafters maintain that the above four conditions must be met "cumulatively" and thus tighten the no-busing intent. Regardless, knowledgeable anti-busers will instantly recognize that imaginative pro-busing judges will make mincemeat of the bill's no-busing intent by way of these four clauses.

Because of these four clauses, the National Association for Neighborhood Schools cannot support S.1760. With such language, the bill would leave school districts already under busing orders literally "swinging in the breeze".

There is also no doubt that courts will interpret the "intentional and specific" language of clause 1 to mean than they can continue to order forced busing in future cases upon such findings. The courts have never admitted they have been doing otherwise.

S.1647 (East)

Section 2(a) is a statement of Congressional powers to enact the legislation. Section 2(b) is the statement of Congressional fact-finding against forced busing, including the excellent finding that busing "has been undertaken without any constitutional basis or authority since the Constitution...does not require" school racial balance. Section 2(c) further finds that the right to be free from discriminatory school assignments can best be enforced by denying jurisdiction of the lower federal courts from making such assignments.

Section 3

This section removes the jurisdiction of the lower federal courts to:

1. order the assignment or transportation of a public school student "for the purpose of altering the racial or ethnic composition of the student body...or for any other purpose."
2. require any school closings for such purposes.
3. preclude the fulfilling of any contract specifying the school where teachers or administrators are to perform their duties (thus, the bill takes the ironic step of protecting people whose unions and associations have favored forced busing and lobbied against anti-busing legislation).

Section 4

S.1647 does not include a retroactive or re-opener clause per se on the theory that once lower federal court jurisdiction is removed as per Section 3, state and local authorities may move to dismantle existing orders and that Congress cannot "lead such state and local authorities by the hand". This is perhaps a correct position although squeamish state and local school authorities might not agree.

This theory goes further on to the effect that once state and local authorities move to dismantle an existing busing order and the proponents of continuing the order go before a lower federal court judge to complain, the lower court judge will have to dismiss the complaint for lack of jurisdiction.

Subsequent to introduction, S.1647 was strengthened considerably in this regard and state and local authorities were given a considerable "hint" as to what to do. An addition to the bill's original language, as Section 4(d) provides:

> "A civil action in any State court including a demand for judgement for any relief...may not be removed to any district court of the United States."

Thus, while S.1760 (Hatch) "instructs" state and local authorities to go before "any court" (assumedly state or federal) to seek relief from an existing order (the four "gutting" clauses described in the critique of S.1760 are also intended to serve as "guidelines" for state courts), S.1647 is meant to convey a clearer message to state and local authorities to seek relief before a state court.

You will note, however, that the "removal provision" of S.1647 prohibits such removal to district courts but not to U. S. Circuit Courts of Appeal. However, these latter courts are also "lower federal courts" and their jurisdiction to order busing is also removed.

Summary

The National Association for Neighborhood Schools is composed in the main of citizens from school districts already under federal court busing orders. We must therefore take the position that, at this writing (November 25, 1981), S.1647 is clearly the stronger measure.

As is always the case with weaker anti-busing legislation, such efforts are designed to preclude forced busing in future cases and those currently under litigation while ignoring or giving short shrift to existing orders. Passage of such legislation would leave those of us "holding the bag" in a precarious political position as to impact on the Congress.

Between the two bills, we must support S.1647 over S.1760. However, we would prefer that S.1647 be amended to remove Supreme Court appellate jurisdiction.

STOP FORCED BUSING

NANS

NATIONAL ASSOCIATION FOR NEIGHBORHOOD SCHOOLS, INC.

AN INTRODUCTION TO NANS

This will introduce you to the National Association for Neighborhood Schools, a truly national anti-busing organization.

At this writing, NANS affiliates and chapters are operating in Boston, Mass.; Yonkers, N.Y.; Pittsburgh, Pa.; New Castle County (Wilmington), De.; Columbus and Cleveland, Ohio; Jefferson County (Louisville), Kentucky; three counties surrounding St. Louis, Mo.; Southwest (Berrien County)Michigan; Austin and Lubbock, Texas; Los Angeles, California and elsewhere across the nation. At this writing, new affiliates are being formed in Rapides Parish, La. and Ft. Lauderdale, Fla.

The purpose of NANS is to make Congress stop forced busing (the assignment of children to schools to achieve racial balance). We intend to make Congress confront and stop the courts on the issue. It is our conviction that Congress has the power, under Articles I (its power to make the laws) and III (its power to limit or remove the jurisdiction of the federal courts) of the Constitution to do precisely that by simple majority vote legislation and the signature of a willing President. Although forced busing can also be stopped by amending the Constitution, and we push for such an amendment, we know that such action will not be necessary if Congress exercises its clearly granted powers.

NANS also pushes for legislation intended to stop federal departments such as the Department of Justice and the Department of Education on the issue, as well as opposing other types of federal intervention in our schools.

Even if your own area is involved only with state or locally-initiated busing schemes, don't kid yourself. It is the threat of federal action that "inspires" your state and local officials.

NANS is incorporated as a tax-exempt citizens lobby under Section 501(c)(4) of the Internal Revenue Code (contributions to NANS are not tax deductible). Our political action committee, NANS-PAC, is registered with the Federal Election Commission. We are governed by the usual slate of officers, an Executive Board, and a 30-plus member Board of Directors. With the exception of our paid Washington lobbyist, everyone involved with NANS is a volunteer.

Membership in NANS is $ 10 for an individual, $ 15 for a family and $ 100 for an organization. Members receive our informative (usually bi-monthly) bulletins. We also constantly urge contributions to our NANS Lobbying Fund and expect our affiliates to participate in this and our other initiatives.

We hope this will encourage you to form a NANS affiliate in your area and to support our many activities. We also hope you will

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Nancy Yotts, Boston, Mass.

"spread our word" even further by encouraging your friends and relatives in other parts of the nation to do the same.

SOME NANS ACTIVITIES

SPOTLIGHTING THE CONGRESS. We compile roll call records on key busing issue matters in the U. S. Senate and House of Representatives. These roll call records are available upon request from the president's office indicated at the bottom of the preceeding page.

OUR WASHINGTON LOBBYIST. In June, 1980, we took the significant step of hiring a skilled professional lobbying firm to represent our interests in Washington, D. C. The firm, Richardson, Randall & Associates, was named by U. S. News Washington Letter as "one of the top ten lobbyists in Washington". The cost of such expertise comes extremely high. As NANS receives no grants from government or foundations, we depend on the financial support of ordinary, concerned citizens. Our lobbyist's efforts, of course, are coordinated with the activities of our grass roots activists in pressuring their elected representatives.

NANS-PAC. During the 1980 campaigns, our non-partisan political action committee, which does not contribute funds directly to campaigns, sent busing issue roll call information to candidates opposing pro-busing incumbents, asking that they make those voting records an issue in their campaigns. We sent out hundreds of press releases to media in the states and congressional districts exposing pro-busing incumbents. We helped candidates prepare position papers on the issue. In addition, other organizations and periodicals helped spread NANS name and used our information during the campaigns.

NANS STATISTICAL AND INFORMATION CENTER. Our info center (5506 Applegate Lane, Louisville, Ky. 40219) gathers and disseminates information and resources on the negative impact of forced busing. Our affiliates have the responsibility of compiling such information as it pertains to their own areas. We also review studies, books and other articles on the issue and use them to advantage. Through such efforts, we counter the propaganda of the pro-busers - a very necessary NANS function.

SUPPLYING SPEAKERS TO IMPACTED AREAS. NANS officers and directors are prepared to travel anywhere in the nation to meet with concerned citizens and speak at public meetings as we strive to further organize grass roots efforts and pressure on the Congress. Whenever the threat of forced busing "hits" an area, you can be sure that NANS will try to contact the anti-busing forces there.

William D. D'Onofrio, President
National Association for Neighborhood Schools, Inc.
1800 W. 8th St., Wilmington DE 19805
Telephones: 302-658-1856; 302-998-6646

We Need Your Support. JOIN NANS NOW ! Send your check or money order ($ 10 per individual, $ 15 per family, with any amounts over and above gratefully accepted, especially donations to our NANS Lobbying Fund) to NANS, P. O. Box 14887, Columbus, Ohio 43214. Include your name, address and, if you wish, your phone number.

COPY AND DISTRIBUTE TO YOUR FRIENDS AND NEIGHBORS

STOP FORCED BUSING

NANS **National Association for Neighborhood Schools, Inc.**

Making Congress Stop Busing By Simple Majority Legislation

It is the position of the National Association for Neighborhood Schools that Congress, under the Constitution and without resorting to a constitutional amendment, has the clear power to stop forced busing - the assignment of children to schools in order to achieve racial balance or "correct" racial imbalance supposedly brought about by "constitutional violations".

It is universally accepted that forced busing can be stopped by the cumbersome process of amending the Constitution. However, it is our position that Congress, using its law-making powers under Article I and elsewhere in the Constitution and given its power to "check" the federal courts under Article III, Section 2, can stop federally-coerced racial balancing schemes by simple majority vote legislation and the signature of a willing President.

It goes almost without saying that Congress, through its given Constitutional control on the use of federal funding, can stop other federal departments, such as the Department of Justice and the Department of Education, from coercing school districts into racial balance or seeking busing orders in court. This essay will deal with stopping the federal judiciary.

It is correctly argued that, short of a constitutional amendment, acts of Congress to stop busing such as removal of federal court jurisdiction to order such "remedies" will not stop state and local authorities from embarking on their own racial balancing schemes, backed by activist state judges emulating their federal brethren. We submit, however, that, **with the threat of federal court action removed,** the people, working through their state legislatures and state constitutions, can stop busing brought on by such state and local authorities. First, the power of the federal courts to order busing must be extinguished, for it is this specter that is used by state and local authorities for their "voluntary compliance" initiatives.

Thus, although NANS will continue to push for an amendment to the U.S. Constitution banning forced busing brought on by all levels of government, our intention is to stop the federal courts on the issue, ending, in the process, all busing orders already in place, by simple majority legislation passed by Congress and signed into law by the President. Then, with the authority of the federal courts to order busing removed, the republican form of government envisioned by the Founding Fathers can manifest itself at the state and local levels.

president's office
1800 W. 8th St.
Wilmington, DE 19805

communications office
3905 Muriel Ave.
Cleveland OH 44109

membership office
4431 Okell Rd.
Columbus, OH 43224

Article III of the Constitution

The basis for removing or limiting judicial power was provided by the Founding Fathers in Article III of the Constitution. In Section 1 of that article, the Constitution provides that the judicial power is vested in one Supreme Court and in such inferior courts as Congress may establish (e.g., Circuit Courts of Appeal and District Courts). In Section 2, the Constitution declares that the Supreme Court shall have appellate jurisdiction in law and in fact **but with such exceptions and regulations which Congress might make.**

Legal scholar Charles E. Rice of the Notre Dame Law School, pointing out that this Congressional power by extension, also applies to lower federal courts, has written (*"Congress and Supreme Court Jurisdiction"*, Washington, D.C., The American Family Institute, 1980, p. 2):

> There is no question but that Congress has the power to define entirely the jurisdiction of lower federal courts. . . The Congressional power to ordain and establish inferior courts includes the power of "investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Examples of Congress' exercise of its power to withdraw particular subjects from the jurisdiction of lower federal courts are the Norris-La Guardia Act of 1932, which withdrew from federal courts jurisdiction to issue injunctions in labor disputes, and the Emergency Price Control Act of 1942, which withdrew from federal courts jurisdiction over certain civil actions.

Prof. Rice quotes from *Lockerty v. Phillips, United States Attorney, 319 U.S. 182, 187*, decided in 1943.

The provision quoted in Article III, Section 2 was included by the Framers as one of the checks and balances intended to prevent any of the three federal branches from building inordinate power, as the courts have done. As Alexander Hamilton, who was actually a proponent of Supreme Court power, explained in the *Federalist, No. 81*, the provision was intended to give "the national legislature. . . ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove" the "inconveniences" that could result from powers in the Constitution given to the federal judiciary.

The same Chief Justice John Marshall who, in his ruling in *Marbury v. Madison* in 1803 helped invent the prevailing doctrine of judicial supremacy that has brought about the situation we are in today, so broadly interpreted the provision of Article III, Section 2 in other decisions that the Court was held to have no jurisdiction on any matter unless that jurisdiction was expressly granted by Congress.

In the 1805 case of *United States v. More, 7 U.S. (3 Cranch), 159 170-171*, the Marshall Court said:

> When the Constitution has given Congress the power to limit the exercise of our jurisdiction and to make regulations respecting its exercise, and Congress under that power has proceeded to erect inferior courts, and has said in what cases a writ or error or appeal shall lie, an exception of all other cases is implied And this court is as much bound by an implied as an expressed exception

In the 1810 case of *Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314*, the Court said:

> The appellate powers of this Court are not given by the Judicial Act, they are given by the Constitution But they are limited and regulated by the Judicial Act and by such other acts as have been passed on the subject

In the case of *Ex parte McCardle, 74 U.S. (7 Wall.) 514*, the Supreme Court promptly dismissed the case for want of jurisdiction, which had been removed when Congress deliberately repealed the Act giving Court jurisdiction to hear McCardle's case on appeal. Speaking for a unanimous Court, Chief Justice Chase declared in 1868:

> We are not at liberty in inquire into the motives of the legislature. We can only examine its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words. . . Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the case.

In the case of *Francis Wright, 105 U.S. 381 (1882)*, the Court observed in plain language:

> While the appellate power of this Court extends to all cases within the judicial power of the United States, actual jurisdiction is confined within such limits as Congress sees fit to describe. What these powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control.

And of more recent vintage, just prior to the time the Supreme Court moved stridently to completely take over our government, it said in the case of *National Mutual Ins. Co. v. Tidewater Transfer Co., 377 U.S. 582, 655 (1948)*:

> Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *subjudice* (that is, after hearings have begun).

It is obvious then, though by no means used on a routine basis, the "exceptions" provision has been employed periodically by Congress and that the Supreme Court, on a number of occasions, beginning in the early days of the Republic and continuing down to modern times, has admitted to this power of Congress. And the Constitution has not changed in this respect since the last time Congress had the courage to use the provision. It's only a matter of "dusting it off".

Speaking at hearings held by the Ohio GOP Task Force on the Excessive Power of Federal Judges in Columbus, Ohio in May, 1980, renowned constitutional scholar Raoul Berger said that a constitutional amendment is not necessary to stop busing and to claim an amendment is needed supports the mistaken theory that the Constitution requires busing. Congress should act, said Berger, under its authority in Article III, Section 2 to remove school desegregation from the jurisdiction of the courts. Indeed, said Berger, no jurisdiction has been given to the courts on busing. If the Court should declare such jurisdiction-removing legislation "unconstitutional", Berger states emphatically that Congress "must attack the Court by impeachment".

During recent years, legislation removing federal court jurisdiction on busing has been introduced in Congress. In 1976, bills introduced by Sen. William Scott (R-Va.) and Sen. William V. Roth, Jr. (R-De.) were defeated on the Senate floor (in April, 1979, similar legislation sponsored by Sen. Jesse Helms (R-N.C.) removing court jurisdiction on prayer in public schools actually passed the Senate before dying in House committee), Congressman Lawrence P. McDonald (D-Ga.) has consistently introduced such legislation in the House only to have it die in committee. In 1979, Congressman John M. Ashbrook (R-Ohio) introduced his H.R. 1180, which read simply:

> No court of the United States shall have jurisdiction to require the attendance at a particular school of any student because of race, color, creed, or sex.

The Ashbrook measure also died in the liberal and pro-busing dominated House Judiciary Committee. In February, 1981, Congressman Ashbrook reintroduced his H.R. 1180 (capturing the same bill number) in the 97th Congress.

The Discharge Petition

Anti-busing legislation need not lie buried in committee. In the House of Representatives, a mechanism called a discharge petition can be used to force legislation from a hostile committee and on to the floor for a roll call. When the discharge petition accumulates the signatures of 218 of the 435 House members, the bill is forced from committee. It was by this method that Congressman Ron Mottl (D-Ohio), with the help of nationwide grass roots citizen pressure by NANS, brought his anti-busing and pro-neighborhood school constitutional amendment to the House floor in July, 1979. Although the Mottl Amendment failed on the floor, the point had been proven. The anti-busing movement can bring meaningful legislation to the floor where elected representatives can be pressured into voting for it. And with a more conservative and responsive legislature, both in the Senate and House (in the Senate, strong anti-busing Sen. Strom Thurmond (R-S.C.), now chairs the Senate Judiciary Committee), we can make Congress confront the federal courts on the busing issue.

The 1964 Civil Rights Act

Article I, Section 8 (18) of the Constitution states clearly that Congress shall have the power "To make all laws which shall become necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department of officer thereof". And, under the Constitution, the Court is a "department" and judges are "officers"

The 1964 Civil Rights Act, in addition to clearly defining "desegregation" as not meaning "the assignment of students to public schools in order to overcome racial imbalance", also states that "Nothing herein contained shall empower any official or court of the United States to issued any order seeking to achive a racial balance in any school by requiring the transportation of pupils. . . in order to achive such racial balance".

The legislative record of the 1964 Act disclosed that the bill's Senate floor manager, Hubert Humphrey, declared, "If the bill were to require (busing) it would be a constitutional violation because it would mean the transportation of children based solely upon their race". Humphrey alluded here to the 1954 Supreme Court *Brown* decision, which declared racial assignments of students to be unconstitutional.

However, with the Congress sitting by watching, the Supreme Court, beginning with its 1969 decision *Swann v. Charlotte-Mecklenberg*, began upholding racial balance busing orders.

In 1974, a liberal and pro-busing Congress dutifully gutted the 1964 Act's anti-busing language, which they had allowed the Court to ignore anyway, by passing the "Scott-Mansfield" amendment to the 1974 Equal Educational Opportunities Act, which stated that the Court could ignore any anti-busing language in the legislation when "remedying" purported violations of the 5th and 14th Amendments to the Constitution. The Scott-Mansfield language must be repealed. And the submissive posture of the Congress must be changed by the American people.

Congressional action such as the 1964 and 1974 Acts (that is, the anti-busing language of the latter prior to being gutted) are within its powers under Section 5, the "enforcment section", of the 14th Amendment (The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article"). According to Professor Rice, the Congress can certainly use this section to stop forced busing. Congress, which has the authority to dictate "remedies" or penalties for violation of the law, can use this section to dictate or specify the extent of the remedies available for school-related "constitutional violations". In so doing, however, the Congress must be prepared to deal strongly with a judiciary intent on going further than the law as passed by Congress allows.

William D. D'Onofrio, President
National Association for Neighborhood Schools, Inc.
February 23, 1981

Appendix

Excerpts from the U.S. Constitution as they apply in the fight against forced busing.

Article I

Section 1 All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

Section 8 The Congress shall have the power

9. To constitute tribunals inferior to the Supreme Court;

18. To make all laws which shall become necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9 No money may be drawn from the treasury, but in consequence of appropriations made by law *(Note: Herein lies the power of Congress to prohibit federal funding of given matters).*

Article II

Section 2.2 (The President) shall have power. . . by and with the advice and consent of the Senate (to) appoint. . . judges of the Supreme Court and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

Article III

Section 1 The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior *(Note: Herein lies the basis for impeachment of federal judges).*

Section 2 The judicial power shall extend to all cases, in law and equity, arising under this Constitution. . .*(Note: The various kinds of cases are then listed).*

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, **with such exceptions, and under such regulations as the Congress shall make** (emphasis added) *(Note: in the opinion of legal scholars, this latter clause, by extension, applies as concerns inferior federal courts).*

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one mode or the other of ratification may be proposed by the Congress.

Article VI

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof. . . shall be the supreme law of the land. . .
3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution.

(Thus, Article VI states that it is the Constitution that is supreme, not that judges are supreme. When elected officials allow judges to violate the Constitution, those elected officials violate their own oaths of office.

For a plain language text exposing the doctrine of judicial review (read supremacy) as a legal fiction, the reader is urged to read ***Judicial Supremacy: The Supreme Court on Trial,*** *by Congressman Robert K. Dornan and Csaba Vedlik, Jr., Nordland Publishing International, Inc., 3009 Plumb St., Houston, TX 77005, $5.95.)*

Amendments to the Constitution

The Bill of Rights - the first ten amendments. Ratified Dec. 15, 1791

Article I (The First Amendment)
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article V (The Fifth Amendment)
No person shall be . . . deprived of life, liberty, or property without due process of law.

Article IX (The Ninth Amendment)
The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X (The Tenth Amendment)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people *(Note: The Constitution nowhere gives the federal government any powers over education, public or private).*

Amendments After the Bill of Rights

Article XIV (The Fourteenth Amendment) *(Ratified July 9, 1868)*

Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

(Note. The 14th Amendment was a "locking into the Constitution" of an Act of Congress, the 1866 Civil Rights Act. "Violations" of this Amendment, along with the 5th Amendment, are used by the courts as the rationale to order forced busing.

Perhaps the foremost text refuting the prevailing doctrine surrounding the 14th Amendment is ***Government by Judiciary: The Transformation of the Fourteenth Amendment,*** *by Raoul Berger, Harvard University Press, 1977.*

In it, Prof. Berger exhaustively examines the legislative history and record of both the 1866 Civil Rights Act and the 14th Amendment and proves conclusively that the Framers had no intention for the 14th Amendment to address the problem of segregation.

Instead, the Framers intended the Amendment to address only certain "enumerated rights" for newly freed slaves, such as the right to buy and sell property, the right to enter into contracts, and the right of access to the courts. The 14th Amendment did not even give Negroes the right to vote, which was granted in the 15th Amendment.

The National Asociation for Neighborhood Schools does not oppose desegregation. We are opposed to assignments to schools based on race. It is our position that the Constitution did not address the matter of school segregation, or desegregation, until it did so by an Act of Congress in the form of the 1964 Civil Rights Act. And that Act prohibited the assignment of children based on race or to correct racial imbalance in the schools.)

STOP FORCED BUSING **National Association for Neighborhood Schools, Inc.**

NANS

The Myth of Judicial Supremacy

by William D. D'Onofrio, President

Now that a more conservative Congress is hinting at taking steps to stop forced busing, stubborn advocates of that outrageous policy are increasingly being given forums in the national media to bombard Americans with the same old pap.

As an example: Newspaper readers were recently treated to an article written by Clarence Mitchell, former head of the NAACP's Washington office, who used as the basis of his arguments the legal fiction involved in the busing issue. Although we in NANS have always lashed out at such tripe, the time has come to really start zeroing in, for it is this type of argument that will be used increasingly by our opponents in the months ahead. The following should help you point out, especially to your elected officials, that the emperor has no clothes on.

Mitchell began his article by citing the supremacy clause of Article VI, which demands that the Constitution be binding on everyone. However the intent of the Founding Fathers in Article VI was that the **Constitution** be supreme, not **judges.** The Constitution must be binding on judges who instead pervert it and on elected officials who, sworn to uphold it, **violate their own oaths** by allowing judges to do so.

Referring to the first instance in which the Supreme Court declared an act of Congress unconstitutional, Mitchell said, "Since *Marbury vs. Madison* in 1803, the **prevailing doctrine** [emphasis ours] has been that 'it is emphatically the province of the judicial department to say what the law is'." Thus, the admission that a "doctrine" somehow came to be **after** the Constitution was ratified! This monstrous legal fiction, the doctrine of judicial review (read judicial supremacy), which the Supreme Court and the legal profession invented out of thin air **after** the Constitution was written and ratified, has created a government by judiciary subversive of representative government.

This judicial house of cards has been left standing because people have only slowly been aroused enough to begin huffing and puffing it down through their elected representatives. As Prof. Raoul Berger, author of **Government by Judiciary: The Transformation of the Fourteenth Amendment,** asks, "How long can public respect for the Court, on which its power ultimately depends, survive if the people become aware that the tribunal which condemns the acts of others as unconstitutional is itself acting unconstitutionally?" Clearly the indictment against judicial supremacy is that it is unconstitutional.

The concept of judicial review is nowhere to be found in the original Constitution or its amendments. The Founding Fathers, in authoring the Constitution at the Philadelphia Convention in 1787, had no intention of making such awesome judicial power part of that document. The pertinent history of that Convention and the subsequent usurpation of power by the judiciary is documented by Congressman Robert K. Dornan and Cseba Vedlik, Jr. in their recently released **Judicial Supremacy: The Supreme Court on Trial** (Nordland Publishing International, Inc., 3009 Plumb St., Houston, TX 77005, $5.95).

Judicial review was the post-ratification brainchild of Alexander Hamilton (who considered the people "a great beast") and his disciple, Chief Justice John Marshall, who was appointed by President John Addams - all members of the elitist Federalist Party.

President's Office
1800 W. 8th St.
Wilmington, DE 19805

Communications Office
3905 Muriel Ave.
Cleveland, OH 44109

Membership Office
4431 Okell Rd.
Columbus, OH 43224

2 The Myth of Judicial Supremacy

Those who would quote Hamilton as a constitutional authority are hardly being candid. As a sample of his thinking, he proposed a plan at the Philadelphia Convention whereby the President and all senators would be elected for life; and state governors, appointed for life by the President, would have absolute veto power over state legislatures. This scheme was soundly rejected, and Hamilton took little part in the Convention thereafter. Instead, the Framers adopted the thinking of James Madison, the "Father of the Constitution", who held that republican (elective and legislative) remedies were the solution to all governmental problems.

Madison, **the** voice of authority as concerns the intent of the Founding Fathers, was later to say that to allow the judges "to stamp (a law) with its final character. . .makes the Judicial Department paramount in fact to the Legislature, **which was never intended and can never be proper."** [emphasis added]

But what about *Marbury vs. Madison*, the "basis" for judicial supremacy? In the Judicial Act of 1789, Congress attempted to give the Supreme Court certain powers of *original* jurisdiction (to hear a case first, before it had been heard in a lower court) in matters in which the Court, under Article III, Section 2 of the Constitution, is merely limited to *appellate* jurisdiction. The gist of *Marbury* was that the Court correctly **rejected** as unconstitutional the powers that Congress was trying to give it! It is thus ironic that this decision was **later** used by the Court and the legal profession to **take** powers not granted to it under the Constitution! Chief Justice Marshall's statement in *Marbury*, "It is emphatically the province of the judicial department to say what the law is," was uttered in *obiter dictum*, a mere aside, not forming a part of the decision itself and thus not binding on the case.

For nearly 100 years, *Marbury* and the later *Dred Scott* decision (1857) were the only two times the Supreme Court declared acts of Congress unconstitutional. Blacks are familiar with *Dred Scott*, in which the Court denied citizenship to Negroes because they were [illegible]sidered property, and permitted the extension of slavery into free territories. It is highly significant that Congress, five years later in 1862, **ignored** this Supreme Court decision and prohibited slavery in the territories. **Congress can do the same on forced busing in the states.**

During this long period following ratification and , indeed, long after *Marbury*, great Americans such as Madison, Thomas Jefferson, Andrew Jackson and Abraham Lincoln, who understood the Constitution and its separation of powers, soundly rejected and fought off the notion of judicial supremacy and kept the Court in its proper adjudicating place. And so did Congress.

Then, beginning in the 1880's, an activist Court slowly began its since unchecked usurpation of power until today, following its accelerated pace of the past thirty years, we are quite dizzy with it all. During the latter period of 100 years, with our elected officials standing by benignly, this band of black-robed tyrants has overturned its own decisions regarding the meaning of the Constitution over 150 times! Apologists for an activist Court use the rationale that the Constitution "must be adapted to a changing society." Included in this staccato flip-flopping are its decisions on racial school assignments, which we call forced busing.

As Professor Lino A. Graglia, author of **Disaster by Decree: The Supreme Court Decisions on Race and the Schools,** points out, they have moved from saying that the Constitution **permitted** racial assignments to schools (the long-standing "separate but equal" doctrine of *Plessy vs. Ferguson)* to saying that it **prohibits** such assignments (the 1954 *Brown* decision which most Americans applauded) to saying that it **requires** such assignments (the 1969 *Swann* decision and subsequent decisions mandating racial balance in the schools). During all this time, not a single word in the Constitution has changed!

In a recent speech on "The Future of the American Judiciary," Senator Joseph R. Biden, Jr. (D-Del.) said, ". . .when the courts proceeded from de-segregation. . .to integration defined by racial balance and effected by court-ordered busing. . . they passed beyond what the 14th Amendment requires into what, although it may be a clearly desirable goal, may not be mandated by the courts. That is a realm - if it is to be entered by government at all - that may be entered only by elected public officials who are directly accountable to the people, and it is the realm where the independence of the courts is most vulnerable to attack."

In his article, Clarence Mitchell astoundingly claimed that the 1964 Civil Rights Act authorized the Justice Department to file suits to force racial balance busing to "uphold" the *Brown* decision (which **prohibited** racial assignments of students). But the legislative record of the 1964 Act disclosed that the bill's floor manager, Sen. Hubert Humphrey, declared, "If the bill were to require (busing), it would be a constitutional violation because it would mean the transportation of children based solely upon their race." The Act itself states, in addition to clearly defining "desegregation" as not meaning "the assignment of students to overcome racial imbalance,"that "Nothing herein contained shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils . . . in order to achieve such racial balance."

The courts have used the "equal protection clause" of the 14th Amendment as the "constitutional" basis for requiring forced busing. But the 14th Amendment is surrounded by a myth all of its own. As Professor Berger points out, the 14th Amendment merely locked into the Constitution the 1866 Civil Rights Act and the latter merely gave newly-freed slaves the rights to enter into contracts, to buy and sell property, and the right of access to the courts on the basis of those limited rights. Attempts by some congressmen to have the 1866 Act address the problem of segregatopm were soundly defeated.

The legislative record of the 14th Amendment (ratified in 1868), shows that Congress made no effort to have it address segregation. It did not even give blacks the right to vote. That was given in the 15th Amendment. The term "civil rights and immunities" used in the 1866 Act was changed in the amendment to "privileges and immunities" to make the amendment more palatable to the states, which, at that time, would never have ratified it had it been intended to address segregation. Furthermore, the Civil Rights Act of 1875, passed nine years after Congress passed the 1866 Act and the 14th Amendment, still did not address segregation.

Right or wrong, that is the way it was; and the Supreme Court's "interpretations" of the 14th Amendment are merely inventive exercises and bogus law. It was not until the 1964 Civil Rights Act that the Constitution, **by an act of Congress,** finally ended segregation by law. And that Act clearly prohibits forced busing as a "remedy" for school segregation, real or imagined. If the excuse for judicial activism is legislative procrastination, the '64 Act should have ended such activism on matters it clearly addresses.

Is the Court to determine "what the law is"? Article I of the Constitution, the Founding Fathers being, if anything, **legislative** supremacists, states that it is the Congress that is empowered "to make all laws which shall become necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department of officer thereof." What could be plainer?

In a remarkable November, 1980, speech at Vanderbilt University Law School, ever-candid Supreme Court Justice William Rehnquist, condemning many of his judicial brethren, called for "new controls on courts to prevent 'judicial supremacy' where appointed judges, rather than elected representatives, set policy by arbitrarily declaring laws unconstitutional." Said Rehnquist, "If we. . .force people by law to do what we would like to see them do voluntarily, we run the risk of another crisis in our society, equivalent to the days of the New Deal or even of the Civil War." (Washington **Star,** November 20, 1980)

The house of cards that is judicial supremacy and the Supreme Court's busing decisions will be blown down. Some say that the doctrine of judicial supremacy has been in place too long to be modified or discarded short of amending the Constitution. Nonsense! In the words of Professor Raoul Berger, ". . .it is never too late to challenge the usurpation of power . . .Usurpation - the exercise of power not granted - is not legitimated by repetition." Congress will be made to react to this truth, and the anti-busing movement is pleased to be a part of the assault on the legal fiction of judicial supremacy.

William D. D'Onofrio, President
National Association for Neighborhood Schools, Inc.
January 16, 1981

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STOP FORCED BUSING
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Testimony by William D. D'Onofrio
President
National Association for Neighborhood Schools
1800 W. 8th St.
Wilmington DE 19805

Subcommittee on Separation of Powers
of the
Senate Judiciary Committee
U. S. Senate

On the negative effects of racial balance school busing
in New Castle County, Delaware

president's office
1800 W. 8th St.
Wilmington, DE 19805

communications office
3905 Muriel Ave.
Cleveland, OH 44109

membership office
4431 Okell Rd.
Columbus, OH 43224

STOP FORCED BUSING
NANS

This past June, the federal judge under whose final order forced busing began in New Castle County, Delaware gathered into his chambers the school board officials and attorneys involved - people who, over three years of forced busing, have bent over backwards out of deference to the wishes and demands of the court.

With no small amount of gall, the judge told the group they had to regain public trust in the schools or face the probability that increasing numbers of parents would remove their children from the public schools. Said the judge, "...if you do not have public support for your public school system, in the end you will have nothing. You will have children in the public school system who cannot afford to flee. That is what you will be left with...But if you proceed as in the past...then the result is preordained." This after three years of busing "working".

During the four years 1971-74, before the threat of forced busing enveloped New Castle County, what was to become the "desegregation area" of 1978 lost a total of only 6.5 per cent of its white enrollment.

Then, in 1975, parents began to become aware of the interdistrict or city-suburbs intentions of the federal court. During three years of what sociologist David Armor would describe as "anticipatory white flight", 1975-77, and three years of actual racial balance busing, 1978-80, the public schools have lost 40 per cent of their 1974 white enrollment. White enrollment went from 64,679 in 1974 to 38,980 in 1980.

In 1980, the third year of forced busing, with officials claiming white flight had "abated", white enrollment decline remained steady at eight per cent, with white decline in the two most affluent of the four attendance areas at ten per cent.

This year, 1981, if preliminary enrollment figures as cited in the local newspaper are any indication, it appears that white decline in the fourth year of forced busing will again be around eight per cent.

Schools neatly racially balanced at around 20 per cent black in 1978 became, without any semblance of a "constitutional violation", rather quickly racially imbalanced. Some became 50 per cent black.

Now, to start the current school year, 45 per cent of the area's students, assigned on the basis of their skin color to achieve racial balance in 1978, have been reassigned, under coercion from the court, to reachieve racial balance in 1981.

Of 103 schools in operation in 1977, the year before forced busing began, 68 remain in operation.

I must point out that all of this has taken place under an ambitious city-suburbs or metropolitan remedy that the proponents of such schemes theorize will inhibit white flight.

And I must also point out that, according to the 1980 U. S. Census, the white population in New Castle County has declined only 1.1 per cent in ten years.

During the years 1975-80, white non-public school enrollment among students residing in the nine majority white former suburban districts has increased by 47 per cent. And if you adjust these figures for what is purported to be birth rate decline or decline from other "non-desegregation" factors, you can come up with an effective non-public white enrollment increase here of over 60 per cent.

Now why have all these whites left the public schools ? If you want to be boorish and trite you can insist that racism is the underlying cause. However, as the good judge indicated in admonishing hapless school officials victimized by the constitutional perversions of he and his judicial brethren, it goes quite a bit deeper than that. Indeed, Dr. Jeffrey Raffel and the University of Delaware's College of Urban Affairs and Public Policy, polling area parents, discovered that those parents who have withdrawn their children "are no more racially bigoted than those who remain."

Instead, the Urban Affairs pollsters found "... that in the eyes of many suburbanites (busing) has meant a leveling down of educational quality..." Indeed, the essence of forced busing is perceived to be an "equalizing" of educational opportunity by lowering standards - a system of education by the lowest common denominator.

The pollsters found dramatic decreases in the levels of parental participation in the educational process. They found that poor curriculum, lack of discipline (in a racial balancing situation), their children's safety, and their children not being challenged academically were the major reasons for white withdrawal. And they concluded that "those (parents who have withdrawn their children) are the most concerned about their children's education" and comprise those who were "most likely to provide leadership for the public schools."

Test results, on the other hand, seem to indicate that all is well, that the kids are learning and progressing academically under forced busing. But there has been no comparing by school authorities of achievement scores before and after the start of forced busing. And, although school authorities hint that there have been dramatic gains by black students, the released achievement scores are not broken down by race, although I am told by teachers that the scores are reported by race.

But people look at these released achievement scores with a baleful eye. Students complain that the test given at the beginning of the school year is exactly the same as the one given later on in the year. Teachers confide to me and others who report back to me that the practice of "teaching to the test" is being carried to extremes.

Let me give you an example. Prior to the start of forced busing, Greenville Elementary School serviced one of the most affluent suburban areas in the nation. In 1980, the school's racial makeup was over 60 per cent white, 19 per cent black (mainly from the inner city) and

13 per cent Hispanic (in order to preserve the barrio, inner-city Hispanics are bussed en masse to certain suburban schools while whites and blacks are shipped countywide to achieve racial balance). Yet, despite the loss of over 40 per cent of children from middle-middle and upper-middle class families who would be attending the school were it not for the busing order, the 1980 fourth graders at this school were reported to have scored better than 92 per cent of fourth graders nationally, up from 74 per cent in 1979. This tends to stretch the imagination.

With regard to discipline, I can tell you that there is a clear perception that school officials are unwilling and unable, given both imposed and self-imposed restraints of sensitivity, to meaningfully control disruptive elements. Teachers' statements corroborate these perceptions.

There are claims that whites are moving back into the city, but I am not aware of data backing up such claims as they would apply to meaningfully integrated neighborhoods or attendance in public schools by significant numbers of children from white families moving in.

The 1980 Census, to no great surprise, did indicate a moderate movement of blacks to certain suburban areas. This had been taking place well before the advent of busing and there is no evidence of any real acceleration as a result of busing. It is ironic, however, that recent black movement to the suburban area directly to the north of Wilmington, combined with white flight, excacerbated racial imbalance in the schools and resulted in racial reassignment of students.

There have been other readily discernible manifestations of citizen outrage and disgust with the schools and the government. After three years of a court-ordered appointed school board, citizens were allowed in late 1980 and earlier this year to vote in school board elections. Few bothered. In the last such election, only 2,600 of 200,000 registered voters showed up at the polls - little more than one per cent. It was a different story last fall, when voters had their first chance to vote on a proposed school tax increase. The referendum was crushed 47,500 to 4,800 - by 10 to 1.

In closing, I must point out the real reasons for citizen attitudes in New Castle County. In essence, they have to do with an unacceptable definition of terms and a refusal to accept the guilt handed down by the courts, the policymakers, and the media.

Suburban New Castle County schools, subsequent court decisions to the contrary, were desegregated in 1956 and those in Wilmington in 1956-58. In 1967, the Department of Health, Education and Welfare, enforcing the 1964 Civil Rights Act, declared Delaware to be "the first border state to remove all vestiges of a dual school system." A 1968 school district reorganization act of the state legislature, which is held out as a constitutional violation, was actually found by the court not to have been passed with discriminatory purpose. Parents of today's school age children, who themselves attended desegregated schools, albeit not racially balanced, for all or most of their lives, do not equate racial balance busing with desegregation. In my experience, this applies across the nation.

Then there is the phrase "denial of equal educational opportunity". Prior to the start of forced busing, per pupil spending in the majority black Wilmington district was 47 per cent higher than the average of the suburban districts and the highest in the state. Wilmington had the highest paid teachers and administrators, the most favorable teacher-pupil and administrator-pupil ratios, a tax rate set by a benevolent city council and not subject to referenda, and a per-pupil real estate assessment ranking 13th among 26 state districts. With some 13 per cent of state enrollment, Wilmington received over 50 per cent of federal school aid flowing into the state. In terms of quality of plant, when they started forced busing in 1978, 14 schools were closed in the suburbs and none in the city. With the start of forced busing, suburban school tax rates were increased under court duress by an average of 50 per cent in order to "level up" to the expenditures of the "constitutionally violated" Wilmington district.

Suburbanites find all this rather curious and bizarre.

APPENDIX I PUBLIC SCHOOL PUPIL ENROLLMENT, NEW CASTLE COUNTY "DESEGREGATION AREA" AND PREDECESSOR COMPONENTS, 1970-80

Year	White	% White Change	Black	Hispanic	Other	Total
1970	69,206	—	15,263	(combined,	314)	84,783
1971(1)	70,173	+ 1.4	15,623	(combined,	557)	86,353
1972	68,827	- 1.9	15,782	(combined,	887)	85,496
1973	66,912	- 2.8	15,708	(combined,	1,184)	83,804
1974(2)	64,679	- 3.3	15,804	985	366	81,834
1975(3)	61,769	- 4.5	15,148	1,099	462	78,478
1976(4)	57,019	- 7.7	15,271	1,026	545	73,861
1977(5)	52,998	- 7.1	15,309	1,137	509	69,953
1978(6)	47,008	-11.3	14,891	1,115	544	63,558
1979	42,306	-10.0	14,547	1,111	495	58,459
1980	38,980	- 7.8	14,317	1,286	563	55,146

Source: State of Delaware, Department of Public Instruction
Planning, Research, and Evaluation Division

(1) Case of Evans vs. Buchanan re-opened, 12/10/71.

(2) 7/12/74 Court rules that a unitary school system "had not been established" and orders submission of a "city only" plan and plans involving "incorporating other areas of New Castle County".

(3) 3/27/75 In a 2-1 decision, the court finds "a historic arrangement for interdistrict segregation" and indicates its preference for an interdistrict remedy.

(4) 5/19/76 Court proposes a plan combining eleven districts (City of Wilmington and ten suburban districts) into a single district. State's largest district (Newark), after earlier deliberations had indicated it would not be included, is included.

(5) 8/5/77 Implementation stayed pending appeal of remedy.

(6) 1/9/78 Implementation of racial balancing city-suburbs busing ordered to begin 9/11/78.

Note: In 1974, which is the comparative year for demonstrating subsequent white flight in this presentation, only some 3,200 of 64,679 white students were in the majority black Wilmington and DeLaWarr districts. Thus, virtually all of subsequent white flight has been from the nine majority white districts.

During all of the liability phase of Evans vs. Buchanan and for most of the remedy hearings, residents of the Newark district (the state's largest, with 15,829 white students in 1974) assumed they would not be included in the final order. White enrollment decline in Newark was only 0.7%, 1.8% and 3.3% during the years 1975, 1976 and 1977. Thus, the potential for anticipatory white flight in the county as a whole for the years 1975-77 was diminished. However, with the start of busing in 1978, with Newark included, white flight in that area was 10 per cent followed by 11.5 per cent in 1979. In addition, the low white public school enrollment decline for that district, 1975-77, was no doubt influenced by white movement into the district in anticipation of Newark not being included in the final order (see non-public school enrollment for that district in Appendix II, which indicates that there was white flight from public schools in Newark during 1976 and 1977.)

APPENDIX II WHITE ENROLLMENT, DELAWARE NON-PUBLIC SCHOOLS, BY PREDECESSOR DISTRICT OF RESIDENCE IN AREA INVOLVED IN THE NEW CASTLE COUNTY BUSING ORDER, 1975-80

(Data by race not available for years prior to 1975)

Former District	1975	1976	1977	1978	1979	1980
Alfred I. duPont	1,890	2,286	2,480	2,724	2,942	2,959
Mt. Pleasant	898	1,042	1,071	1,194	1,187	1,284
Claymont	565	655	663	700	699	707
Alexis I. duPont	881	973	1,025	1,185	1,338	1,278
Marshallton-McKean	865	948	977	1,057	1,100	1,057
Stanton	881	1,076	1,139	1,269	1,254	1,207
Conrad	1,835	1,907	1,856	1,862	1,831	1,768
Newark	1,134	1,501	1,713	2,290	2,964	3,178
New Castle-Gunning Bedford	1,381	1,552	1,634	1,714	1,738	1,704
Total, 9 majority white suburban	10,330	11,940	12,558	13,995	15,053	15,142
DeLaWarr (majority black suburban)	449	450	457	315	285	287
Wilmington (majority black)	2,769	2,540	2,307	2,097	1,938	1,922
Totals, 11 districts	13,548	14,930	15,322	16,407	17,276	17,351

Source: State of Delaware, Department of Public Instruction
Planning, Research, and Evaluation Divisions

Remarks: The above table does not include students residing in the areas involved and who have been determined to be attending non-public schools out-of-state. Nor does it include students residing in the areas involved who are attending public schools in the convenient neighboring states of Pennsylvania, Maryland and New Jersey. As concerns the former, the number increased from 1,602 to 1,726 during 1975-80. No figures are available for the latter.

The above table indicates that white non-public school students in the two former majority black districts may have returned to public schools when schools in their neighborhoods became majority white under the court order.

Non-public school white enrollment from the nine majority white former suburban districts increased by 4,812, or by 47%, 1975-80. However, it is generally offered by school authorities that enrollment decline due to "non-desegregation" factors (e.g., birth rate decline and normal out-migration) is around 3 or 4 per cent annually. Discounting the 1975 enrollment figure for the nine majority white former districts of 10,330 by 3 and 4 per cent for the succeeding years 1976-80 would indicate an effective white non-public school enrollment increase from those districts of 6,273 (61%) or 6,720 (65%) respectively. One cannot reasonably attribute significant portions of public school enrollment decline to "non-desegregation" factors and not adjust non-public school enrollment increase for the same phenomena.

APPENDIX III PARENTAL PERCEPTIONS AND ATTITUDES UNDER CITY-SUBURBS FORCED RACIAL BALANCE BUSING IN NEW CASTLE COUNTY, DE.

The following are excerpted from "One year later: Parent views towards schools in New Castle County after the first year of desegregation", by Jeffrey A. Raffel, College of Urban Affairs and Public Policy, University of Delaware, 1979. They reflect the results of scientific polls taken by "Urban Affairs" before busing began (1977 and early 1978) and "one year later" (1979). In categories 1 through 4, the sample included 200 Wilmington parents (virtually all black) and 315 suburban parents (virtually all white) who had at least one child in public school at the time of all polls. The remaining categories involve a sample of 103 parents who withdrew their children during the summer of 1978 (before busing began that September) and 131 who withdrew their children during the first year of busing. Thus, these categories involve both "anticipatory" and "experience" responses.

	Wilmington parents		Suburban parents	
	1977	1979	1977	1979
1. "How do you rate your school district ?"				
"good or excellent"	46%(1)	51%(3)	79%(2)	37%(3)

(1) Wilmington district, 1977 (2) 10 suburban districts, 1977
(3) Single racially-balanced countywide district, 1979

	Wilmington parents 1977	Wilmington parents 1979	Suburban parents 1977	Suburban parents 1979
2. "Will (has) desegregation improved the education of blacks ?"				
"yes"	52%	38%	30%	37%
3. Oppose/strongly oppose busing	42%	53%(1)	90%	88%

(1) only 40% favor/strongly favor

	Wilmington parents 1977	Wilmington parents 1979	Suburban parents 1977	Suburban parents 1979
4. Parent activity: Report doing "often".				
Help child with homework	60%	40%	83%	50%
Visit classroom	22%	6%	24%	11%
Attend PTA	19%	7%	34%	21%
Serve as aide or volunteer	11%	3%	29%	12%

5. "Very important" concerns in decision to withdraw children from public schools.

	Parents of summer '78 withdrawals	Parents of withdrawals during '78-'79 school year
Curriculum	84%	69%
Discipline	81%	73%
Safety	61%	67%
Child not learning	60%	81%
Quality of education lowered by busing	55%	66%
Child wouldn't be challenged	54%	64%
General concern about busing	50%	38%
Child not happy in public school	44%	53%
Poor teaching in new school	40%	52%
6. "Very important" factors that would influence a return to public schools.		
"if more discipline"	46%	73%
"if more ability grouping"	32%	56%

[From the Washington Post, Feb. 28, 1982]

(By Michael Barone)

BUSING AND QUOTAS ARE THE WRONG FIGHTS

Is the civil rights movement fighting the wrong battles? That seems a cruel question at a time when civil rights leaders feel they must devote most of their energy to holding on to gains they thought they had already secured and refighting battles they thought they had won. But it is a question that should be asked.

Those who devote themselves to achieving equal rights and fair treatment for blacks should not allow their agenda to be set by those who are hostile or indifferent to their goals. Civil rights forces are necessarily busy defending established policies like the Voting Rights Act and denial of tax exemption to racially discriminatory private schools. But however busy they are, they should take time out to ask these questions: how are the rights of blacks abridged and fair treatment of blacks prevented in the America of 1982? How can progress best and most rapidly be made toward making our society more decent and fair toward blacks?

If the civil rights community really ponders these questions, I think it would choose to allocate its inevitably scarce resources of personnel, money and psychic energy quite differently from the way it is today. Specifically, I think the civil rights movement would achieve more gains for blacks if it devoted much less attention to the issues generally referred to as busing and quotas and devoted more attention to open housing and basic education for blacks.

Let us look at each of these issues in turn.

Busing. Brown v. Board of Education and other lawsuits ended legally required school segregation in the South. The current busing lawsuits extend the reasoning of Brown and other cases to school systems many of which never had legal segregation and most of whose separation of students of different races results from neighborhood residential patterns. Whatever the legal merits of busing cases, they have not done much to improve education for blacks. Scholars are divided on the question of whether black students have benefited, but no one argues that they have benefited very much.

Moreover, the integration produced by busing cases seldom proves to be permanent. When children are suddenly forced to attend school with children of a substantially lower socioeconomic class, parents typically move to the suburbs or seek out private schools. When busing mixes together children from such different backgrounds, they may very well end up learning a lesson we do not want to teach and that is not in fact true: that blacks inevitably are academically inferior to and economically poorer than whites.

Quotas. Quota hiring programs have produced some gains for blacks, but in the 1980s the gains are likely to diminish and the costs are likely to grow. One cost is that quota programs inevitably cast into doubt the achievements of blacks who qualify for their positions on the basis of non-quota criteria; they strengthen the erroneous prejudice that blacks cannot succeed unless given special help. A quota system requires assignment of jobs and places in schools by racial classification, which makes race a more important rather than less important characteristic in society.

Quota systems may have been useful in the short run to rectify some egregious forms of racial discrimination. But in the long run quota systems are intellectually indefensible, for they rest on the premise that in a fair society every racial and ethnic group will be represented proportionally to its population in every occupational, educational and professional category. We know from the experience of groups like Jews, Chinese and blacks, who have achieved greater than proportionate representation in certain professions despite discrimination, that this premise is false.

Both busing and quotas are under attack from the Reagan administration, and the reflex of the civil rights movement is to defend them. Moreover, institutional inertia works in favor of continuing emphasis on busing and quotas: the lawyers' organizations that bring busing cases and the equal employment bureaucracies are in place and are convinced their work should go on. But these are likely to be losing battles, since most Americans think busing and quotas are unfair. And even if the civil rights forces can win these battles, their victories will produce only marginal gains for American blacks.

Open Housing. Here is an area where major gains in racial equality are relatively easy to attain. Barriers to open housing are becoming easier to overcome, and can be lowered much further by legislation that already has wide support. The 1980 Census showed that blacks in substantial numbers are able to buy or rent in suburbs and city neighborhoods from which they were effectively barred 20 or even 10 years ago by racial discrimination.

A strong open housing bill of the type passed by the House and favored by a majority of the Senate in 1980 would tend to discourage the real estate industry from outright discrimination and to make it more sensitive than it is now to the possibility that black clients may want to buy or rent in areas that are now mostly white. A substantial increase in the dispersion of blacks from all-black to mostly white neighborhoods would do what busing has failed to do; give black and white children a chance to attend schools they want to attend as equals and friends.

Instead of fighting efforts to end quotas and busing, the civil rights movement should concentrate on urging the Reagan administration to prove its claim that it is not racist by pushing a strong open housing law. Open housing, after all, does not entail the kind of government decision-making the Reaganites abhor in busing and quotas; it would simply allow blacks, like whites, to freely choose were they want to live.

Basic Education. Almost everyone agrees that a substantial minority of young blacks emerge from public schools without basic skills or good work habits. Such young people are, for practical purposes, unemployable, except perhaps for a large employer who needs to fill a quota. But employment quota programs have a significant effect only on big businesses, which produced no net gain in jobs in the 1970s, and on government, which does not appear likely to be a growth industry in the 1980's.

Small employers—the growth sector of the economy—want workers with basic skills and good work habits, and undoubtedly many small employers tend to assume that all black applicants have the low skill levels and bad work habits that an unfortunately large minority do. The best way to increase job opportunities for blacks is to convince everyone that blacks are in fact receiving the basic education they need.

Probably more progress is being made here than national observers know. Competency tests for students have been sweeping the nation, starting in the South; standardized test scores in big cities have been rising; some visible black leaders have been emphasizing the need for basic skills. More needs to be done—by civil rights groups, by government, by teachers' organizations and the education schools, and by anyone else who has a good idea.

To concentrate on open housing and basic education is to concentrate on the root causes, not just some of the effects, of racial discrimination. Such a concentration requires a different deployment of the civil rights movement's resources of personnel, money, and, most important, psychic energy. The civil rights movement has been most successful when it has captured the attention of the whole society and focused its indignation on repugnant forms of racial discrimination. Its moral energy should not be squandered on arguments that 11 percent rather than 7 percent of the students in a medical school class should be black. Most Americans want to live in a racially fair society. The civil rights movement needs to focus all Americans' attention on practices that prevent blacks from enjoying equal rights—practices that can be changed.

[From the Chicago Tribune, Sept. 12, 1981]

THE BURDEN OF FORCED BUSING

(By D. L. Cuddy)

On July 21, the Justice Department informed U.S. District Judge Milton I. Shadur that the Chicago Board of Education's school desegregation plan was "inadequate." Although on Aug. 28 the Justice Department reversed itself and said it was satisfied with the plan, Hugh McComb, a school board attorney, indicated that if no further progress toward desegregation were made, in December the Justice Department might well resubmit its original finding of inadequacy.

Implicit in the Justice Department's attitude, however, is the concept that a desegegation plan ultimately will be deemed "adequate" only when systemwide racially balanced school integration has occurred. Unfortunately, such an attitude leads to the almost inevitable conclusion that a massive court-ordered forced busing program will eventually be required to achieve racial balance in all of Chicago's public schools.

I attended an integrated school even before the Supreme Court's 1954 Brown decision, and I have taught in both predominantly black as well as predominantly white neighborhoods. As a result of those experiences, I can assure Judge Shadur and the Justice Department that "racial balance" in schools is not required for black youngsters to receive equal educational opportunities. In fact, it is something of a racist notion that blacks must be next to a certain number of white students in order to learn.

Indeed, If massive, forced busing in Chicago is ordered to achieve racial balance in schools, this will be discrimination against blacks. Statistically, the minority population must be bused in inverse proportion to the majority population in order to achieve racial balance.

From the experience of nationally acclaimed Chicago school teacher Marva Collins, we know full well that it is an emphasis on academic achievement, and not the "achievement of racial balance," that is needed for blacks to excel.

When educational excellence is emphasized, we then do not have "a black 'A' student" but rather "an 'A' student who happens to be black." Besides, what demonstrated educational purpose is served by black students riding a segregated school bus perhaps for an hour across town from a segregated neighborhood, to a racially balanced integrated school, and then back again to a segregated neighborhood?

And with a massive mandatory busing program taking blacks in disproportionate numbers away from their neighborhoods, will it not be far more difficult for poorer black parents to be supportive of their children's extracurricular activities at schools far away?

Under a forced busing program, blacks would be told that they must get on a school bus whether they like it or not. What must be realized is that while blacks want government to protect their right to live or attend school wherever they wish, blacks do not want the government forcing them to live or attend school in some particular place against their will.

Often, though, we hear that forced busing is used "only as a last resort." But is that really true? Will Chicago courts have exhausted all other alternatives before a massive forced busing program is ordered? Will magnet schools have been tried in addition to a tax incentive plan (Where parents are given tax credits if they send their children to schools in neighborhoods inhabited predominantly by those of another race) in addition to college tuition credits (where, as in St. Louis, students receive a year's free college tuition for each year they attend an integrated high school)? Will all of these have been tried before a massive, mandatory busing program is implemented?

May I offer a simple solution to the problem of forced busing? It is a solution I feel will be satisfactory to the majority of those of all races. Congress might simply pass the following bill entitled: "To End the Discriminatory Forced Busing of Blacks"—

(1) Whereas we live in an open society, nothing should be done to prevent the voluntary integration of schools;

(2) Whereas, however, forced busing to achieve racial balance discriminates against blacks because the minority population must be bused in inverse proportion to the majority race's population, forced busing to achieve racial balance will be prohibited and no individual of any race will be denied the right to attend his or her neighborhood school; but

(3) To insure that the termination of forced busing to achieve racial balance does not result in coercive resegregation of schools and unequal educational opportunities for students of any race, any student will have first choice and free transportation to attend a school in another neighborhood inhabited predominantly by those of another race when a court has determined that racial discrimination in educational opportunities has occurred.

With "first choice," the school board could not claim that certain schools were already filled; and with "free transportation," the school board could not prevent the poor of any race from attending the school of their selection. Thus, school boards everywhere will bend over backwards to see that all schools receive equal funding, facilities, and teachers. And black students will be guaranteed to their own satisfaction that they are receiving equal educational opportunities. Forced busing then will no longer be deemed necessary.

If only someone in Congress will introduce such legislation, not only might the problem of forced busing be avoided in Chicago, but everywhere else in the nation as well.

[From the Washington Post, June 24, 1981]

Is It Time To Get Off The Bus?

(By William Raspberry)

It's too soon to know whether the House-passed anti-busing legislation will also clear the Senate. But the fate of that mischievous piece of legislation (which says the Justice Department may not "bring or maintain" any action to require the housing of students beyond the close-neighborhood school) may be more harmful to presidential prerogatives than to the education of black children.

Busing for school desegregation has nearly always cost more in political, financial and emotional capital than it was worth in educational gains for black children. It is an issue that has unified much of white America and justified some of its baser instincts without similarly uniting black America, which never really was that hot for busing. It has torn communities apart for precious little educational gain, and it has nearly bankrupt the NAACP.

An occasional study here and there have found some slight gains in black achievement as a result of busing, but more typically even the optimistic, pro-busing studies can claim little more than that white children aren't hurt by busing.

And for all the hoopla over the question of "forced busing," there has, in fact, been relatively little of it. According to the U.S. Commission on Civil Rights, only 3.6 percent of the children who ride buses to school do so for purposes of integration. For the overwhelming majority, buses are just a way of getting to school.

Most of the impetus for busing has come from white political activists and the civil rights establishment, most notably the NAACP and the NAACP Legal Defense Fund. It has interested rank and file blacks primarily on the basis that opposition to busing has been seen as evidence of continuing white racism. In other words, blacks have tended to be less for busing than against anti-busing whites.

Ordinary blacks have understood, even if the black leadership has not, the difference between the racial segregation that was outlawed in 1954 and the active integration of schools that later came to be the trend. Indeed, the anti-busing legislation attached earlier this month to the Justice Department authorization bill would have been greeted with cheers from black America back in the mid 1950s. What they wanted then was precisely an end to racially based busing beyond the nearest neighborhood school.

Not only were the all-black schools to which black children were then bused generally inferior and less well-financed than the white schools they passed every morning, there was also the psychological damage done to black children by a policy that said, in effect, that they weren't good enough to attend the nearby white schools. The psychological damage inflicted in more recent years came from the implication that the problem with black schools was that they were black; that the way to cure what ailed black children was to see to it that they had white schoolmates.

Nobody ever put it quite that way, of course. The favored formulation was that racial isolation was harmful to black children (though, curiously, not for white children) quite apart from the quality of facilities, the financing and the teaching at black schools. Still, the suggestion was that black children needed white schoolmates.

What black children have needed all along is quality education, and that, as the District of Columbia is learning, can be had in black schools as well as in integrated ones. This is not to say that rank-and-file blacks have favored segregation. They haven't. They have merely resisted the implication that schools whose students are black because the school neighborhoods are black are, on that account, inferior.

Perhaps the clearest illustration of that feeling is the attitude of blacks toward historically black colleges and universities. Blacks who would wage bitter war against a policy of officially segregated colleges have argued with equal fervor against government policies that would eliminate black colleges. It is racist to say that black Virginians may not attend Old Dominion University. But is it right to say that Norfolk State University must be merged out of existence as a black-oriented institution?

The arguments in favor of the traditionally black colleges stand in interesting contrast with those made on behalf of public school integration. In the case of the colleges, the argument is: We have our own traditions and concerns; we understand and care about black students, and we know how to teach them. Just give us the resources and leave us alone. But when it comes to the public schools, the argument is that black children need not just first-class resources and facilities but also white schoolmates and teachers. Some of us never bought it.

There are areas where racial segregation remains a problem, and the anti-busing legislation will harm federal efforts to correct it. But it may well be that the major mischief of the anti-busing rider is that it weakens the authority of the president to enforce the law of the land.

As President Carter said when he vetoed a bill containing a similar rider: "The real issue is whether it is proper for the Congress to prevent the president from carrying out his constitutional responsibility."

[From the Detroit News, Mar. 30, 1981]

UNFAIR BURDEN—WHY SOME BLACKS OPPOSE BUSING

(By D. L. Cuddy)

"You know what? I'm against forced busing, too!" That remark was made by a young, intellectual, black principal while I was addressing a meeting in Raleigh, N.C., of the local Fellows of the George Washington University Institute for Educational Leadership.

The principal's pronouncement was based on the fact that the burden of busing has fallen predominantly on blacks. In a school system where the black-white ratio is 30 to 70, for example, 70 percent of the black students must be bused to achieve racial balance, but only 30 percent of the white students must be bused.

And if the purpose of forced busing is to achieve societal integration, increasing numbers of blacks are beginning to wonder if the required movement of their children to integrated schools during the day, and back to segregated neghborhoods at night, isn't becoming a permanent "solution" to the problem of racial discrimination, rather than the temporary solution forced busing was originally designed to be.

Decades ago, "freedom of choice" was a slogan used by many whites largely for the purpose of maintaining segregated schools, with black schools usually of inferior quality. To correct this situation, the federal government logically was asked to assist blacks in receiving guaranteed equal educational opportunities. From that request, however, the federal government embarked on a policy that, at least tacitly, supports the racist view that black students cannot learn unless they are seated next to whites.

As one who attended a racially integrated school in the South in 1952 (two years prior to the U.S. Supreme Court's Brown decision), and who taught in both predominantly black as well as predominantly white neighborhoods, I can say two things regarding black-white educational relationships.

- First, in schools where educational excellence rather than social promotion is emphasized, there appears to be less racial discrimination.
- Second, during my public school teaching career, I had more disciplinary difficulty with spoiled students from affluent neighborhoods than I did with economically deprived, yet educationally motivated, black students in the same school.

While the Scholastic Aptitude Test scores for white students have been declining for approximately the past 17 years and many white youths have seemed determined to ruin their lives with drugs, black students whose parents have emphasized educational achievement have had a golden opportunity to excel. From time to time, I meet several of my black former students and now find that one works at the local state university, one at a television station, one is working toward her college degree in psychology, and I believe one is now an officer in the U.S. Air Force.

The point here is that, with government protection guaranteeing equal educational opportunities, blacks can perform as well as whites. But neither blacks nor whites want the government to adopt the principle that it can force people to do that which they do not want to do (e.g., forced sterilization, euthanasia).

While blacks desire federal protection against discrimination so that they may attend whatever school they wish, go to any public establishment they choose, and live wherever they please, blacks do not want government implementing a policy that, for example, would require the breakup of black neighborhoods, forcing the residents against their will to disperse throughout the white community. Blacks as well as whites have pride in their neighborhoods and realize the importance of neighborhood schools.

What of the contention, though, that we live in a world where blacks and whites must live together, and abandonment of forced busing might lead to a return of segregated, albeit voluntary, society? It should be emphasizes here that the problem is not busing, but rather *forced* busing. There is nothing wrong with students voluntarily requesting to be bused to schools outside their neighborhoods. There is nothing wrong with school systems developing districts within which black neighborhoods already exist so that an integrated school system may occur naturally. And although "magnet" schools are undesirable for many because they tend to develop elitist attitudes among students, a majority of the American people might favor—instead of forced busing—an approach where students of all races voluntarily would choose to attend secondary schools offering programs fitting students' special interests.

Concerning the government's role, it is entirely proper for the government to guarantee that each school receive proportional financial support, and that teachers include all races and be of equivalent ability in each school. There is also nothing wrong with government offering developers incentives to construct housing projects on the outlying growth areas of urban communities that would allow racial representation.

As indicated earlier, the problem is *forced* busing. And blacks increasingly seem to be voicing their opposition to this apparently permanent federal policy, the burden of which falls predominantly on their children and their race.

[From the Washington Post, Mar. 24, 1981]

THE PROBLEM IS 'FORCED' BUSING

(By D. L. Cuddy)

"You know what? I'm against forced busing, too!" That remark was made by a young intellectual black principal while I was addressing a meeting (in Raleigh, N.C.) of the local Fellows of the George Washington University Institute for Educational Leadership.

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Concerning the government's role, it is entirely proper for the government to guarantee that each school receive proportional financial support, and that teachers include all races and be of equivalent ability in each school. There is also nothing wrong with government offering developers incentives to construct housing projects on the outlying growth areas of urban communities that would allow racial representation.

As indicated earlier, the problem is "forced" busing. And blacks increasingly seem to be voicing their opposition to this apparently permanent federal policy, the burden of which falls predominantly on their children and their race.

[From the New Republic, Feb. 28, 1981]

THE WRONG-WAY BUS RIDE

(By John H. Bunzel)

The US Supreme Court declared in 1954 that dual school systems and other forms of *de jure* segregation were to be eliminated. It also ruled that it was unconstitutional for a state to segregate blacks from whites on the basis of race or to use racial classifications to limit the opportunities of all its citizens. This was a monumental development which, in the next 25 years, would affirm that it was wrong to distinquish among people on the basis of color or ancestry and that every assault on discrimination was grounded in the law of the land. Although it did not remove the poison of racism in American society, it profoundly changed the character and condition of our major institutions.

Although the landmark decision upheld the constitutional principle of school desegregation, it did not call for affirmative integration. Nor was it intended to promote a particular level of integration, much less judge-made policies of school assignment. The distinction is important. Desegregation does not necessarily mean integration, any more than integration is the only definition of equality. This understanding of the *Brown* decision was reflected in the specific language of the Civil Rights Act of 1964: "Desegregation means assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance."

The first federal school desegregation legislation was enacted as part of the Civil Rights Act. It authorized the government to take a major role in desegregating schools. Even though the authority was of several kinds (for example, to sue and to provide technical assistance) the government's primary power and tool became the withholding of federal funds. However, Section 407(a) of Title IV did not authorize federal officials to issue any directive for achieving equal racial composition in schools by transporting children from one school to another.

In the past 15 years it is the courts that have mandated busing as a remedy to eliminate school segregation. Not only has there been a change in interpretation of what desegregation meant in Brown, but the prescribed objective has become integrated schooling, a goal which the schools have been ordered to meet to comply with new constitutional standards. Moreover, in light of wholly different criteria adopted by the courts, integration now has also come to mean a statistical racial ratio that can be achieved only by busing students out of their local schools. In short, by whatever coercive action the courts have deemed necessary, *Brown* has been reinterpreted to mean racial balance in the schools.

In communities throughout the country, attempts to carry out policies or court orders requiring integrated schooling have met with widespread opposition. Although public opinion polls show that most Americans believe white and black students should go to the same schools and thus support the principle of integration, the overwhelming majority is opposed to compulsory busing. No matter how the questions have been worded in polls conducted in the 1970s, rarely have more than 15 percent supported court-ordered busing to achieve some quota of racial enrollment. The unpopularity of busing is also found in both major political parties. NBC News reported in 1976 that only 16 percent of Democratic primary voters and seven percent of Republican voters favored busing. Further, neither blacks nor whites have approved of busing in majority proportions. Louis Harris, for example, has shown that only 38 percent of blacks favor busing.

It is not necessary to believe that "the voice of the people is the voice of God" to recognize that in a representative democracy public opinion is and should be an important force in politics and has always been relevant to the purposes of public policy. Thus it can be said that it didn't take last year's presidential election to show that strong majorities in the country want to end court-ordered busing. A critical question is how.

At the end of the last session of Congress, an attempt was made to attach a rider to the continuing appropriations bill that would have barred the Justice Department from bringing any legal action to require school busing. In the face of a veto by President Carter, it was removed by House and Senate conferees. Sponsors of the busing ban have promised to reintroduce the issue in the new Congress and President Reagan has said he would sign it.

One of the many problems with this proposed course of action is that it raises serious questions about whether such a ban involves an unconstitutional encroachment by Congress into the executive and judicial branches of government. Furthermore, would the banning of "any sort of action" prevent the Justice Department from bringing school desegregation suits altogether? By limiting the kind of remedy the department could seek, would Justice be prevented from ensuring that federal funds are spent in a nondiscriminatory manner? Former attorney general Benjamin R. Civiletti concluded that putting new restrictions on Justice "could disable the executive branch from taking any action to prevent the government from participation in a constitutional violation." Apart from these legitimate concerns (among others), there is an improtant and more practical question: is this particular approach the best way for Congress to give political expression to its feelings about busing and to determine how best to enforce what Senator Jesse Helms calls the "mandates of the Constitution?"

There are equally good reasons to be unenthusiastic about efforts to prohibit court-ordered busing by a constitutional amendment. This is not to deny that the "imperial judiciary" has stood virtually alone in advocating school busing or that the balance of power in areas of social policy has shifted toward judges (and also toward appointed officials in the federal administrative agencies) who are not directly responsive and accountable to the people. But the fact remains that a constitutional amendment involves a long and tortuous process which, as history demonstrates, is unlikely to be successful. On only four occasions have constitutional amendments been passed to overturn Supreme Court decisions.

There are additional objections to banning compulsory busing by constitutional amendment or by other forms of direct democracy such as recall, initiatives, and referenda. One reason James Madison preferred a representative government to a pure democracy was because representative government protected individual liberties and rights from abuse by unrestrained majorities. Legislators, as politicians, are required to consider their constituents' feelings but also to practice the arts of compromise and accommodation. Constitutional amendments and referenda make compromise difficult because complicated issues are reduced to a simplistic choice of "yes" or "no."

Seventeen years ago there was strong public support for the Civil Rights Act because most Americans share the traditional liberal commitment to equality of opportunity. But, as they consistently said, they do not believe in compulsory school busing. That is not their idea of what equality should be all about. No president has ever publicly and unequivocally called for busing either. Nevertheless, busing has become part of a major distortion which has occurred in the liberal tradition of equal opportunity. This transformation has occurred for two reasons: first, because civil rights groups have grown in political importance and fervor, and (particularly in Democratic administrations) wield influence out of proportion to their size. Second, the courts and bureaucracies have dictated solutions that should have been developed by our elected representatives.

The time has come, therefore, for a thoughtful and comprehensive reexamination by Congress (in the words of Justice Lewis Powell) "of the proper limits of the role of the courts in confronting the intractable problem of public education in our complex society." Congress could begin reasserting its own powers and responsibilities by modifying the direction the Court has taken when it has accepted busing plans that transport students across city-county, city-suburbs lines, even when this involves busing between wholly separate political jurisdictions. However, the Court has not always ordered that this be done. In 1974, in *Milliken* v. *Bradley,* the Court ruled that busing across municipal boundaries was not necessary in the Detroit area, because there was insufficient evidence of segregation based on state action or segregative intent by suburban officials. But in 1979 the Court upheld sweeping federal court busing orders in Dayton and Columbus, Ohio, ruling that the two school systems had the "affirmative duty to eliminate the effects of past discrimination even if it no longer discriminates." If integration is truly a constitutional proposition and therefore a just remedy for the nation's past wrongs, why should only some school districts be integrated through mandatory busing, but not others whose history is not significantly different?

Another persistent problem has been that judges have gone beyond their range of perception or knowledge. The Supreme Court performs a major and proper function when it reminds us from time to time that the Constitution is a living document, and that its "evolving applications"—in *Brown,* That segregation is wrong and must be ended—often represent our best traditions and values. But the Court is not empowered to define our legitimate or even obligatory egalitarian goals and the means by which they should be attained.

In the spirit of "new beginnings," the new Congress now has an opportunity to express how it feels about the redefinition of equality—whether, for example, it believes equality of condition and result rather than of access and opportunity should be defining principle of American egalitarianism. It could restate with unmistakable clarity the intention and purposes of the Civil Rights Act and then go on to develop additional guidelines for the courts and federal agencies. Congress should start by holding extensive hearings to lay the basis for sound legislative action. In a process of careful fact-finding that the courts could not easily disregard, Congress should call on parents, school officials, and experts from around the country to answer the question: has mandatory busing worked? Almost certainly, the burden of the evidence would be that instead of expanding opportunities for nondiscriminatory public education for children of all races, the busing plans ordered by the courts too often have been destructive of their own integrationist goals.

Some important findings would emerge from the hearings. First, "neighborhood schools" may have been used as a code phrase for racism by some parents. But for many more, such schools are, in the words of one mother who also believes in the principle of integrated schooling, "one of the few thin spiderwebs of community in a sprawling, impersonal city." In Los Angeles, for example, it is not true that racism is the dominant consideration among opponents to busing. David J. Armor, a senior social scientist at the Rand Corporation, has found from his studies that white students are not participating in large numbers in the court-ordered busing plan because the bus rides are too long and the academic achievement at the minority receiving shcools is too low. Race does not show up as a statistically significant factor. It is likely that large numbers of white students would refuse to participate in the Los Angeles busing plan if the schools to which they were assigned were mostly white but were also a long bus ride away and had low achievement scores.

Second, there is no conclusive evidence that school desegregation programs have resulted in significant achievement gains for black children. At one time Professor James Coleman believed that the academic achievement of lower-class black students would improve if they attended schools with white middle-class majorities. His claim formed one of the pillars of the busing decisions and racial balance plans of the past 15 years. New studies, however, have demonstrated that the earlier belief was ill founded. Professor coleman now reports that "there are as many cases where achievement levels decline as where they increase. Thus the notion that black children will automatically increase their achievement in integrarted shcools is shown to be false." Achievement is not unaffected by desegreation, but is about as often affected negatively as positively. "More than anything else," Professor Coleman says, "this shows that the opportunity the *Brown* decision created has been lost: if desegregation had been carrried out appropriately, it would have meant a net gain in the achievement of blacks; but carried out as it has been, the gain has not been realized."

One of the most discouraging consequences of so many of the present mandatory busing policies in large cities is that they are making integration much harder to achieve. As William Raspberry has put it, "unlawful segregation is being replaced by legal resegregation." Almost predictably, white families have moved to the suburbs to avoid having their children treated as numbers in abstractly moral but thoroughly unpopular and disruptive court-ordered busing plans. The public school system has become a major casualty of court-ordered busing as growing numbers of parents demand some kind of support for private schools (tuition tax credits, voucher systems, etc.). Whether brought about by the courts or by HEW administrative action. "destructive desegregation" through busing was never part of the *Brown* agenda.

Third, congressional hearings could establish that various communities in the country have scored successes with alternative programs to foster school integration, such as voluntary busing plans, magnet schools, and voluntary school-transfer programs. If one outcome of Congress inquiry is to impress the courts with the level of public dissatisfaction with mandatory busing, another should be that congress supports and encourages voluntary integration efforts.

Americans continue to believe in the fundamental importance of education as the primary means of attaining full citizenship in our diverse, multi-group society. But most Americans do not regard integration that is enforced by court-ordered busing as one of our basic goals, among other reasons because they do not consider integration to be the only important value with a bearing on education. As Harvard Law professor Lance Liebman has pointed out, the pursuit of mixed schools may well be a significant value—one worth pursuing in one's daily life and in one's political activities, "but it is not a *constitutional* value, one that must prevail against other important considerations, even against such ordinary values as economy, reduced transportation time, and neighborhood autonomy, and certainly not when perceived to be in conflict with the effectiveness of the educational process itself." Accordingly, Congress should reaffirm its own allegiance to the *Brown* decision of 1954 and should place on the public record once again both its commitment to a desegregated society and its strong conviction that it is morally and constitutionally right to achieve it, but not by imposing on the schools an artificial racial balance through compulsory busing. Congress would draw the line at the mechanical process of busing students to accomplish mathematical integration.

The proposal for congressional hearings assumes that the question of busing to achieve racial balance in the schools is as much political as constitutional in nature and therefore should involve greater participation of the political process in the ultimate resolution of the issue. The responsibility and authority of the Court to determine the constitutionality of busing would not be (and could not be) circumvented. But judges cannot replace elected officials who are politically accountable. Furthermore, if integrated education is ever to become genuine and enduring public policy, it cannot be the work simply of judges and bureaucrats. It will need to rest on a national commitment that is not evident today and that can only be developed and sanctioned by the political process. Justice Oliver Wendell Holmes, Jr. once remarked that legislatures, just as much as the courts, are the guardians of the liberties and welfare of the people. Congress should confront the critical issue of how equality in the United States derives its meaning as well as its limits from the larger system of democratic values to which it belongs. A fact-anchored inquiry of the sort being proposed here could explore whether mandatory busing to bring about school integration has in fact served the country well, with the kind of participation and exposure to public view that will keep the American people informed and involved every step of the way.

[From the Washington Post, Aug. 2, 1969]

INTEGRATION OF TEACHERS IS AIM OF U.S. DRIVE FOR EQUAL SCHOOLING

(By Eric Wentworth)

The scope of this task is already being demonstrated as the federal government turns its civil-rights artillery increasingly toward urban school systems outside the Deep South. In case after case, one of the Government's key targets is the segregation of teachers—too many black teachers in black schools, too many white teachers in white schools.

Not only is this a noxious color scheme, the government contends, but to some extent at least the mostly-black faculties tend to have teachers with less impressive academic credentials—and vice-versa.

However, when it comes to schemes for enforcing a better balance of black and white teachers in these schools, the obstacles are immense. A lot of teachers simply don't want to comply.

Desegregating the pupils is one thing—after all, the law requires them to stay in school. But there's no law requiring a teacher to teach, especially to teach in a particular school system he thinks is trying to push him around.

For example, after Indianapolis ordered mandatory transfers for 204 teachers last September to meet the demands of a desegregation order, it discovered that 55 of them had resigned by the end of the year.

More recently, when Memphis sought to transfer nearly 400 teachers to comply with a federal court order, the teachers threatened at one point to go to court themselves.

The highest hurdles to forced teacher desegregation have been erected where the ever-heftier teachers' trade union movement has taken hold. One of the basic protections espoused by the American Federation of Teachers and sought by its affiliates in contracts with school boards is the right to voluntary transfers.

"Forced transfers have been tried in a number of instances," the AFT asserted recently, "and they have brought about increased teacher turnover and a general increase in the teacher shortage."

Transfer rights are a key issue in Chicago, where the Justice Department has threatened court action unless the Windy City's school board takes quick steps to break up its "segregated pattern of faculty assignments."

The Chicago Board, hoping to promote voluntary transfers, has asked Washington among other things for money to offer $1,000 bonuses to teachers willing to work in ghetto schools. It has also proposed lowering its ceiling on the number of fully-certified teachers in each school to spread those less qualified more evenly through the system.

But federal officials doubt they have authority at present to fund ghetto "combat pay"—which teachers unions eye askance in any event. And to lower the ceiling would require rewriting the Chicago board-union contract.

Atop these other obstacles, systemwide desegregation faces still another, relatively new challenge—the mounting clamor for decentralized, neighborhood control from parents fed up with fighting officialdom downtown. And here especially, if there are white parents who want white teachers there are also black parents today who want black teachers.

Judge Wright, while noting two years ago "a significant if not startling" correlation between the races of pupils and their teachers in D.C. schools, stopped short at the time of ordering mandatory faculty shifts.

Mandatory transfers would almost certainly bring a new confrontation between the school board and the Washington Teachers Union. Such a development could only add to the confusion, inner conflict and consequent low morale of a school system that already provides ample proof that the nation's capital is hardly the nation's showplace.

Pro and Con

Should Forced Busing Be Ended?

YES—Blacks should have the right "to attend any school of their choice"

Interview With
Dennis L. Cuddy

History Instructor,
University of North Carolina
At Chapel Hill

Q Mr. Cuddy, why do you feel school busing for racial desegregation should be stopped?

A Because forced busing, as a permanent solution to the problem of how to integrate society, is discriminatory against blacks. For example, to achieve integration in a city that is 70 percent white and 30 percent black requires the busing of 70 percent of those of the minority race, but only 30 percent of the white students.

In addition, it becomes more difficult for the minority students who are bused to participate in extracurricular activities before and after school. And their usually poor parents are deterred from attending parent-teacher meetings or their son's or daughter's athletic or cultural events in schools on the other side of town.

Lastly, there's the loss of the neighborhood-school identification, which results in a loss of respect and responsibility for the school's condition and leads to increased vandalism by those of both races.

Q Proponents of busing say it has lessened discrimination. Wouldn't there be a danger that this trend might be reversed?

A No. The question assumes that forced busing is the only means of maintaining an integrated society, but that's not true. It is doubtful that those blacks living or working in predominantly white neighborhoods would move to predominantly black neighborhoods simply because forced busing was terminated.

We should continue to have an integrated society and maintain the right of blacks to attend any school of their choice, to go to any public establishment they please and to live wherever they desire.

So, if a certain percentage of black parents do not want the government telling them that they must send their children to schools outside of their neighborhood, the government should not be able to overrule the parents.

Q How would you enforce the right of blacks to attend schools of their choice?

A It should be made legally incumbent on every school system to provide equal educational opportunities in all schools. Then relatively few students would choose to leave their own neighborhood schools.

Q Job opportunities for minorities have increased since busing for integration began. Can't this be attributed at least in part to the better education blacks are receiving?

A Well, forced busing is not the only way blacks can obtain a quality education. As one who attended an integrated school in the South before the Supreme Court's 1954 Brown decision, I can attest to that.

Marva Collins, a Chicago teacher, and the All Saints

NO—"Busing has been a very useful tool in correcting wrongs"

Interview With
William L. Taylor

Director, Center for National
Policy Review, Catholic
University of America
School of Law

Q Mr. Taylor, why do you favor the continuation of school busing?

A First of all, it is a matter of the Constitution and the laws of this country. The Supreme Court has found that busing is an indispensable tool in some communities to eliminate the wrong that has been done to minority students through enforced segregation.

Secondly, despite all the furor over it, busing has been a very useful educational tool, as well as a legal tool in correcting wrongs. Researchers tend to agree that when you establish classrooms in which advantaged children are in the majority, there is a favorable educational environment for all children. Busing makes this possible.

Q How do you answer the objection that parents of bused children are unable to participate in the activities at distant schools and bused students cannot engage in extracurricular programs?

A Those claims are not generally true. After the Charlotte-Mecklenburg, N.C., busing plan was put into effect, for example, 10,000 parent volunteers came into the schools—far more than before. Black parents in other communities have told me that while the black school was closer, they actually felt more involved, more able to have an influence on the education of their children in the integrated schools. It is physically inconvenient in some cases, but that is not the only factor.

Q What about incidents of racial strife?

A When desegregation begins, sometimes there is conflict. But when you look at these communities a few years later, you often find there has been a large degree of acceptance.

Q Haven't blacks who stayed in neighborhood schools done as well academically as those who were bused?

A There is a good deal of evidence to the contrary. One researcher who is hostile to desegregation examined a voluntary program in Boston some years ago. He found that black children who went from the central city to suburban schools were getting into better colleges and doing better than black children who went to city schools.

In Louisville, Ky., despite substantial conflict as a result of busing, black students have made significant gains in achievement. And white students' education has not suffered in any way.

The desegregation process is giving people the chance to participate fully in this country, to realize their own potential. And that, I think, is what it's really all about.

Q Aren't some inner-city schools becoming more black and some suburban schools more heavily white, despite busing?

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Interview With Mr. Cuddy *(continued)*

School in Harlem, among others, have shown that economically deprived minority students can score higher than the national average on tests.

As for job opportunities for blacks, those who strive for educational excellence will be able to obtain employment in almost any major American industry today and have tremendous opportunities for advancement. This is not because American industry has suddenly felt a magnanimous attitude toward minorities, but because executives realize that it is in their own economic self-interest to hire the most qualified person, regardless of race.

Q Another reason busing is said to be ineffective is that it is not required between seperately administered city and suburban school districts. Why shouldn't this be tried?

A In countywide school systems, such busing is already occurring, and I have nothing against the city school system expanding to include the county. My only questions are: What about those black parents who feel their children can be guaranteed an equal educational opportunity in their own neighborhood school?. Why would they want their children bused across town every day just to attend a school with a certain percentage of white children?

Q Since most black spokesmen adamantly insist on school busing, wouldn't an end to busing deepen racial animosities between blacks and whites?

A No, because the original purpose of mandated busing was to guarantee equal educational opportunity for all children, regardless of race. Thus, turmoil will only result if blacks are denied equal opportunity.

And may I suggest that whenever black leaders have appealed to the innate sense of justice and fairness in most white Americans, black Americans have had far greater success in achieving their goals than when they have appealed for something on the basis of race alone, which usually results eventually in a reactionary white backlash, unfortunately.

Q How would you stop busing—by amendment to the Constitution, legislative action by Congress or some other means?

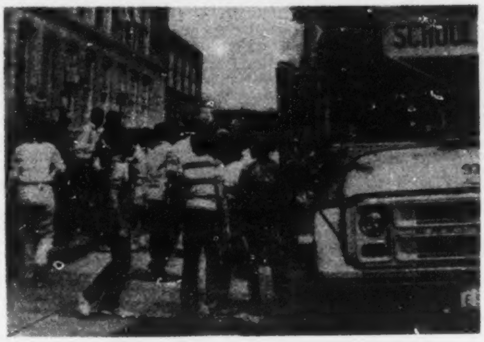
A If it can be shown that equal educational opportunity exists for every child within a school system, then the courts will have no grounds for ordering continued forced busing of blacks and whites against their will.

Q Is there any merit in voluntary programs such as that proposed by the government for St. Louis, which would give college-tuition payments to those who participate in busing programs?

A Yes. Voluntary or incentive or options approaches are the best vehicles for achieving integration. Furthermore, you might try magnet schools—where those desiring college-preparatory instruction go to particular schools, those interested in technical education go to other schools, and those in the arts to still other schools.

But if we are not willing to try the incentive or voluntary approaches, then we must ask whether society would next adopt other unacceptable authoritarian programs. I definitely recommend the nonauthoritarian approach to integration as long as all students are guaranteed an equal opportunity to receive a quality education. ☐

The mandatory busing of schoolchildren to promote desegregation, in effect in many places, is coming under fresh attack in Congress.



Interview With Mr. Taylor *(continued)*

A The most successful programs involve a metropolitan area or county. That is true in many parts of the South, including all Florida counties, the city of Charlotte and Mecklenburg County, the city of Nashville and Davidson County, and Louisville. In these places, desegregation has not led to white flight.

As to Northern cities, the move toward suburbanization has been going on for 40 or 50 years. But if you look at two cities, one in which desegregation has occurred and one in which it has not occurred, five years after the desegregation order you're likely to see the same patterns of migration.

So if we're concerned about racial apartheid in our metropolitan areas, the answer is not to limit school desegregation but to do something about the basic conditions that give rise to apartheid.

Q Should the courts take more-drastic steps, such as requiring busing between suburban and city school districts?

A Well, if you prove there has been widespread deliberate segregation, you will get that kind of a remedy. The Supreme Court has ruled that not only must it be proved that segregation occurred, but also that it affected the whole metropolitan area. That's been proved in Wilmington, Del., and Indianapolis. It has not been proved to the Court's satisfaction in a couple of other cases, principally Detroit and Atlanta.

Q In view of antibusing sentiment in Congress and President Reagan's opposition to busing, is there really any likelihood of strengthening busing laws?

A Frankly, I don't think there is much prospect of a legislative remedy right now. Indeed, there are initiatives to try to cut back, through the use of legislation or constitutional amendments, the remedies that the courts have afforded.

The time of greatest progress in this country was when the courts, Congress and the executive branch all worked together in the 1960s, and recognized that this isn't just a political popularity contest. These issues are crucial to the future of our country.

Q How practical is the Justice Department's proposal for St. Louis, which would give college-tuition payments to those who volunteer to be bused out of their neighborhoods?

A Generally speaking, voluntary measures are certainly to be welcomed. The Justice Department plan draws on a Wisconsin statute that provides reimbursement both to school districts that send students, and school districts that receive students. That has had modest success in Wisconsin. In St. Louis, the added wrinkle is the tuition payments to students. There are all kinds of questions of equity that can be raised. What about students who are not college bound? I don't think anyone expects that it will deal with the basic condition of segregation that exists in that metropolitan area.

There are a number of voluntary efforts that have proved very useful. In Boston, there is a program under which some 3,000 minority students of all incomes have enrolled in suburban schools. There are counterparts in Connecticut, Rochester, N.Y., and other places. But these programs are not equitable in the sense that white students don't enroll in minority schools. ☐

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Real Estate Values, School Quality, and the Pattern of Urban Development in Charlotte, North Carolina

G. Donald Jud
James M. Watts

This study presents estimates of a model that includes the racial composition and academic quality of public schools among the determinants of housing prices. Results suggest that academic quality is a more imporant factor in the determination of housing values than the racial ratio of pupils in area schools. Drawing on estimates of the model, a school preference index (SPI) is developed. The SPI is found to be positively correlated to the level of the academic achievement and negatively related to the level of nonwhite school enrollment. The SPI also is shown to be positively correlated to the level of new residential construction.

More than two decades ago, Charles Tiebout (1956) suggested that residential location decisions are based on preferences for local public goods, including schools. Yet, despite the insights provided by Tiebout's hypothesis, the relationship of public schools to the geographic movement of households and interarea differences in the demand for housing remains incompletely specified, with much of the work that has been done so far focused almost exclusively on the effect of school integration (see Clotfelter 1975b).

The genesis of the debate over the effect of racial desegregation on the level of white enrollment and white flight is the report by James Coleman et al. (1975). The Coleman study concludes that desegre-

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The authors are, respectively, Professor of Economics at the University of North Carolina-Greensboro and Senior Operations Research Analyst, CIBA-GIEGY Corporation. They wish to express their appreciation for the research support provided by the North Carolina Real Estate Research Center. The authors are indebted also to Wayne Church, Betsy Haley, and John Smith of the Charlotte-Mecklenburg Public Schools for their help in obtaining and interpreting school data. Barry Hirsch and an anonymous referee provided valuable comments and suggestions for improvement. [Manuscript received March 12, 1980; revision accepted for publication April 30, 1980.]

gation has been a significant cause of declining white enrollments, especially in larger cities. Coleman's work has received a great deal of criticism charging that the methodology employed overstates the effect of desegregation on white enrollment decline.[1] Although the issue is by no means resolved, Charles Clotfelter's (1979) recent research using Coleman's original data has reported new estimates of Coleman's enrollment model that appear to support the original study, while taking account of most of the methodological criticisms raised by Coleman's detractors.

Clotfelter's (1975a) earlier work on the determinants of real estate values during the 1960s in Atlanta offers additional support for the Coleman thesis. In his Atlanta study, Clotfelter used data on aggregate housing values gathered from 59 census tracts in the Atlanta standard metropolitan statistical area (SMSA). He found that changes in housing values were negatively related to increases in the percentage of black students in neighborhood public high schools. Because the supply of housing is relatively inelastic in the short run, Clotfelter ascribed differences in housing prices among census tracts to differences in housing demand. His research indicated that desegregation of area schools has a negative effect on the demand for housing.

In this paper, we present a model that explicitly includes the racial composition and academic quality of public schools as determinants of the price of housing. Our results suggest that academic quality is a much more important factor in the determination of housing values than the racial ratio of pupils in area schools. We find that when school quality is included along with percent nonwhite as a determinant of housing prices, the racial composition variable is statistically insignificant. Accordingly, our results suggest that (1) housing demand is more strongly influenced by the academic quality of public schools than by the level of racial integration, and (2) other studies that did not hold constant academic quality most likely have overestimated the negative effect of school desegregation on area housing demand.

Drawing on our model of neighborhood housing values, we develop an index of school preference. The construction of the school preference index (SPI) follows the work of Sumka (1977). The SPI is shown to be positively correlated to the level of the academic achievement and negatively related to the level of nonwhite school enrollment. Also, the SPI is shown to be positively correlated to the level of new residential construction in an area, suggesting that housing supply responds to the higher demands generated by preferences for public schools.

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[1] See Clotfelter (1979) for a review and summary of the methodological criticisms of the Coleman 1975 study.

THE PRICE OF HOUSING

Employing the traditional hedonic price approach (see, for example, Freeman 1979; Kain and Quigley 1970; and Rosen 1974), we postulate a model of neighborhood housing values in which the average price of neighborhood housing is determined by the attributes of area homes, neighborhood amenities, distance from employment, and the character of neighborhood schools. This model is presented in equation (1):

$$\ln P_i = a_o + a_1 A_i + a_2 S_i + a_3 I_i + a_4 B_i + a_5 D_i + a_6 R_i + a_7 Q_i + e_i \quad , \qquad (1)$$

where P_i is the average sales price of homes sold in the ith neighborhood; A_i is the average age of the homes sold; S_i is the average size of the homes sold; I_i is average family income; B_i is the percent of black families in the neighborhood; D_i is a measure of the distance to employment; R_i is the proportion of nonwhite students in neighborhood public schools; Q_i is a measure of the academic quality of neighborhood schools; and e_i is a random disturbance term. I_i and B_i, which reflect the socioeconomic and racial makeups of the neighborhood, are used as proxy variables for the level of neighborhood amenities other than public schools.

Because equation (1) is a semilog formulation of the housing value function, the coefficients in the model ($a_1 - a_7$) represent the average fractional change in the price of housing resulting from a one-unit change in the associated housing attributes.[2]

Differentiating equation (1) with respect to any particular housing attribute yields the implicit market price of that attribute, that is, the price that a homebuyer would pay in the market for a marginal change in the attribute, for example, school quality. Rosen (1974) has shown that implicit attribute prices derived from a hedonic price equation are jointly determined by the underlying demand and supply relationships for each particular attribute. If the supply of an attribute is relatively inelastic in the short run, then the implicit attribute price can be viewed basically as demand determined. For public school characteristics (like racial composition) that are determined by administrative discretion, the assumption of a relatively inelastic short-run supply is reasonable.

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[2] The semilog formulation has been used extensively in estimating hedonic models of housing value. See, for example, Kain and Quigley (1970), Mieszkowski and Saper (1978), and Schafer (1979).

DATA

Data for this study were obtained from the City of Charlotte, North Carolina for 1977. Charlotte is the principal city of Mecklenburg County; its population in 1970 was 241,000. A single consolidated public school system serves all of Mecklenburg County. The Charlotte schools have been under court-ordered desegregation beginning with the 1970-1971 school year. Pupil assignment plans have been reviewed and major alterations made about every three years since 1971-1972. Major changes have been made in assignment plans during 1971-1972, 1974-1975, and 1978-1979.

All pupil assignment plans in force since 1971-1972 have been of the "feeder" type. Under a feeder system, students who are assigned to a particular elementary school stay together as they move on to junior high and high school. Like most large urban school systems, the Charlotte system has experienced a decline in white enrollments, amounting to about 1 percent per year since the 1969-1970 academic year.

Our basic unit of analysis was the elementary school pairing or cluster. In 1977, there were 54 such pairings or clusterings of elementary schools serving homes within the City of Charlotte. The analysis was restricted to the City of Charlotte in order to make the sample relatively homogeneous with regard to property tax rates and the availability of public services such as water and sewer.

Data on home sales were obtained from the 1978 Master Appraisal File maintained by the Tax Supervisor of Mecklenburg County, North Carolina. Our sample was composed of every existing single-family residential property that sold during 1977 within the City of Charlotte that also sold at least once during 1972-1976. This sample of repeat sales of existing homes was developed originally as part of a study of recent trends in housing prices (see Jud and Watts 1979). Our sample of 1,146 sales represented about one-third of all existing homes sold in Charlotte during 1977. Analysis of sample means revealed little difference between our sample and the mean price and structure size of all existing homes sold during 1977.[3]

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[3] The mean values for price and structure size in the repeat sample were $32,863 and 1,423 square feet. The mean price and structure size of all existing homes sold during 1977 were $32,174 and 1,430 square feet.

Data from this sample were aggregated to provide average totals for sales price, size of structure, and age for 51 elementary districts in the city. (The sample contained no sales from 3 of the city's 54 school pairings.) Information on the average income and racial composition of the 51 school districts were obtained from census sources. A table showing sample means and standard deviations is given in the Appendix.

Public school data were provided by the Charlotte-Mecklenburg Public Schools. School quality was measured by average grade-level performance on the North Carolina test of reading skills in third grade. Because the pupil assignment plan involved a feeder-type system, we believe that the quality of early schooling is a good proxy for the expectations of homebuyers of the quality of more advanced levels, because students grouped together in elementary school tend to remain together in higher grades. Also, in higher grades, tracking by ability level is more extensive so that mean performance scores at the junior high and high school levels may be less meaningful as measures of the quality of schooling available to individual students.

Reading achievement scores are a reasonable measure of the quality of local schools perceived, rightly or wrongly, by individual homebuyers. Coleman et al. (1966) argue that the school characteristics that most strongly affect student performance are the family background and achievement levels of classmates. Parents who accept Coleman et al. can be expected to be attracted to residential neighborhoods where schools have high achievement scores.

There is disagreement over how to measure school quality, and over precisely what school inputs affect a school's quality. Clotfelter (1975b) points out that previous researchers have tried to measure quality using such variables as per-pupil expenditures, achievement test scores, teacher-student ratios, teacher experience, and surveys of public opinion. Coleman et al. (1966) adopt the rather pessimistic view that the inputs to education have little effect on achievement once account is taken of the socioeconomic status of students. Summers and Wolfe (1977) report evidence to the contrary. Their study of student achievement in Philadelphia schools shows that at least some school inputs have substantial effects on pupil performance. We are inclined to accept the conclusions of Summers and Wolfe, but we avoid the question of precisely what inputs are important by focusing on student achievement and by statistically accounting for the racial and economic character of neighborhood residents.

Table 1 gives the coefficients estimated for equation (1) using data from the 51 relevant elementary school pairings in Charlotte. The dependent variables are the natural logarithms of average market price (P_i) and market price per square foot of structure (P_i/S_i). The equations employing market price per square foot appear to yield more theoretically consistent results for the age and distance variables. A somewhat similar formulation of the dependent variable

TABLE 1. HOUSING PRICE EQUATION ($N = 51$; *t*-value in parentheses).

	Dependent Variable			
	(1.1) $\ln(P_i/S_i)$	*(1.2)* $\ln(P_i/S_i)$	*(1.3)* $\ln(P_i)$	*(1.4)* $\ln(P_i)$
Structure				
Age	-0.004^{a} (-2.295)	-0.005^{b} (-2.691)	0.000 (0.022)	-0.001 (-0.464)
Size	0.011 (0.134)	0.093 (1.111)	0.751^{b} (10.663)	0.812^{b} (11.408)
Neighborhood				
Income	0.014 (1.191)	0.017 (1.303)	0.012 (1.094)	0.014 (1.214)
Race	0.001^{a} (1.838)	0.001 (1.530)	0.000 (0.261)	0.000 (0.119)
Distance	-0.007 (-0.397)	-0.014 (-0.741)	0.011 (0.737)	0.006 (0.371)
School				
Race	0.058 (0.344)	-0.173 (-1.040)	0.049 (0.332)	-0.121 (-0.853)
Quality	0.177^{b} (3.168)	–	0.131^{b} (2.659)	–
Intercept	2.216^{b} (6.147)	2.896^{b} (9.110)	8.489^{b} (26.815)	8.991^{b} (33.140)
$\bar{R}^2$	0.633	0.548	0.951	0.943

Note: Superscripts indicate significance of estimates (one-tailed test).

a. $\geq .05$.

b. $\geq .01$.

has been used previously by Grether and Mieszkowski (1974), Jud (1980), and Sumka (1977).

The positive sign on the neighborhood race variable is consistent with the work of Kain and Quigley (1975), whose research, based on a study of the housing market in St. Louis, indicated that blacks tend to pay more for similar housing than do whites. Kain and Quigley attributed this result to the relative immobility of black households, and to the fact that blacks tend to confine their housing search to black neighborhoods. Evidence from Charlotte appears to provide rather weak confirmation of this kind of racial stratification of area housing markets.

In columns (1.1) and (1.3) in Table 1, the school quality variable is positive and significant at the .01 level.[4] The estimated coefficients on the school quality variable indicate that a one-year increase in average reading score is associated with a 13 to 17 percent increase in neighborhood property values.

The racial composition of schools is not statistically significant in any of the estimated regressions shown in Table 1. Indeed, when school quality and racial mix appear in the same regressions, racial mix has a positive sign, albeit statistically insignificant. When school quality is not included in the regressions (columns 1.2 and 1.4), the sign on racial composition is negative. This appears to suggest that failure to account for school quality may lead to an overestimate of the negative impact of school integration on property values. Our results indicate that real estate values and housing demand in Charlotte are more strongly influenced by academic quality than by the racial ratios of neighborhood schools.

SCHOOL PREFERENCE INDEX

Using our hedonic index of housing values, it is possible to construct a school preference index (SPI). Such an index might find

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[4] Using the linear formulation of the hedonic model the following results were obtained (control variables not shown; t values given in parentheses):

Dependent Variable	*School*		R^2
	Quality	*Race*	
P_i	2,897.37 (2.16)	5,118.44 (1.28)	0.97
P_i/S_i	2.37 (2.70)	0.29 (0.11)	0.66

potential applications in any analysis of the rank ordering of public preferences for area schools. Educational and urban policymakers, for example, may want to analyze public preferences for urban schools in order to reduce possible effects on the pattern of urban growth stemming from preferences for particular schools. The index might also be used as a dependent variable in an analysis of the components of housing demand. Such an analysis might be able to estimate the income and price elasticities associated with the educational service component of housing demand.

Our approach to the construction of the SPI follows that of Sumka (1977). The method of computation is derived from equation (1):

$$(SPI)_i = 1n P_i - a_o - a_1 A_i - a_2 S_i - a_3 I_i - a_4 B_i - a_5 Di \tag{2}$$

where the variables are as defined above, and where the values of the coefficients are those shown in Table 1.

For the construction of the SPI, we employed the estimated coefficents shown in column (1.1) of Table 1. This equation used the natural logarithm of market price per square foot, $1n(P_i/S_i)$, as the dependent variable.

The SPI is a continuous measure that is orthogonal to the structure and neighborhood variables used in equation (1). Table 2 shows the simple correlation coefficients between the SPI and school quality, school racial composition, and the percent of new homes built in each school zone since 1970. All coefficients are significant at the .01 level. The index is positively correlated with school quality and negatively associated with the proportion of nonwhite students; but the correlation with school quality is much higher than with racial composition.

The SPI is positively correlated with new construction activity. This positive association suggests that housing suppliers tend to respond to the higher demand that is generated by preferences for particular public schools. Where public school quality is high, housing prices are bid up and housing supply in the area tends to increase.

TABLE 2. SIMPLE CORRELATIONS.

	School Quality	*School Racial Mix*	*Percent of Homes Constructed since 1970*
SPI	0.996	-0.457	0.394

Accordingly, decisions affecting the quality and racial composition of public schools affect the course of urban development as new housing construction and population gravitate toward areas where school quality is high.

SUMMARY

Our study of housing values in Charlotte strongly suggests that the price of residential real estate is significantly influenced by the academic quality of public schools. We did not find the racial ratio of pupils in public schools to be a statistically significant determinant of housing values in any of the regression equations that we estimated. However, our regression results did indicate that failure to hold constant variations in school quality seems to lead to an overstatement of the negative effect of school desegregation. When school quality was not included among the determinants of real estate value, the negative impact of school racial composition appeared much larger. We interpret these results as suggesting that homebuyers are more strongly influenced by academic quality than by the fraction of nonwhite students in the school.

Our study indicates also that homebuyer preferences for public schools tend to affect the pattern of new construction and thus the direction of urban development. Quite clearly, our conclusions in this area are tentative. If school preferences bid up housing values in an area, then, presumably, the higher prices will dampen the incentive of some homebuyers to move into the area. At the same time, higher prices will positively affect the volume of new construction, bringing an expanded housing supply on the market in response to the higher demand. At this point, we cannot predict with certainty how housing demand and intrametropolitan mobility decisions respond to higher housing prices, nor can we gauge the speed and magnitude of the supply response. Certainly, some very interesting and challenging research remains to be done in this area.

APPENDIX

MEANS AND STANDARD DEVIATION OF VARIABLES ($N = 51$).

Variables	*Mean*	*Standard Deviation*
Dependent Variable		
Price	$32,863.46	13,808.27
Price/Size	18.46	2.65
Structure		
Age	19.86	12.75
Size (in thousands)	1,422.88	414.66
Neighborhood		
Income (in thousands)	11,812.49	2,949.10
Race (% black)	11.53	24.97
Distance	12.11	1.20
School		
Race (fraction nonwhite)	0.36	0.12
Quality	3.59	0.43
Percent of new homes constructed since 1970	5.92	7.72

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SCHOOL DESEGREGATION: A CHALLENGE TO AMERICAN SOCIAL SCIENCE?

By Ralph Scott

In the 1954 *Brown* decision of the U.S. Supreme Court, "separate but equal" school facilities were inherently unequal and Southern states were ordered to desegregate "with all deliberate speed." One result was to bring about the racial integration of Southern schools which increasingly came to serve minority and poor children inasmuch as thousands of middle class whites fled to private schools. With the passage of the 1964 Civil Rights Act, civil rights were no longer seen as a Southern issue: but it was discovered that many Northern Negro students attended segregated schools. Government officials, often acting without clear court sanctions, consequently sought to racially balance – or desegregate – Northern schools. Unlike the South, where blacks and whites were more likely to reside within the same geographical areas, racial balance within Northern schools often required transporting students away from their neighborhood attendance centers. This further exacerbated a problem which in the South had already become one of the most divisive and expensive of educational endeavors – forced busing.

From the outset, the Courts and American social scientists assumed that busing would produce positive benefits in the form of improved minority academic achievements and enhanced racial harmony. In retrospect it seems naive to have assumed that black students would become now intelligent and advance more quickly simply as a result of being seated next to white youngsters. This myth, however, was sustained for many years, largely because, any academician who challenged the presumed benefits of forced busing was seen to be defying conventional and even moralized truths. (1), (2)

It is difficult to overestimate the significance of busing on American education: Presidents Johnson, Nixon, Ford and Carter have all described the practice as the single most significant and divisive of educational issues. Recent longitudinal studies have revealed, much to the surprise of those who shape policies, that busing does not promote inter-ethnic respect and that it fails to promote students' learning. (3), (4) In addition, surveys have demonstrated that the majority of Black, Hispanic, Indian and White parents reject mandated desegregation and want their children to attend the geographically most convenient schools.

The high cost of busing extends beyond social and educational implications. In a very real sense, mandated desegregation and other social measures have made international impacts. Of these, not the least noteworthy has been the fueling of inflation. To at least some degree, the purchasing power of money is eroded when excessive dollars chase (too few) goods. Busing does not add to the Nation's supply of goods. One illustration of inflationary effects: in April of 1978, President Carter sought to soak up excess American dollars by arranging for the Treasury to sell 300,000 ounces of gold at each of six month auctions. (5) At $220 per ounce, this measure brought in $396 million in paper money. But, by the early 1970s and before the energy crunch, *direct* annual Federal busing costs were estimated at $1.5 billion. This is practically four times the presumed savings effected by Carter's widely heralded, anti-inflationary, gold sales.

Forced desegregation continues to be widely implemented despite any evidence of value but, after a period which witnessed its uncritical acceptance, a surprisingly few scholars have managed to swing the door open for what has sometimes become acrimonious debate. One area of dispute involves examining whether or not substantial numbers of whites leave a school district which has been forcibly desegregated: the "white flight" issue. Authorities on both sides of the controversy agree that the question is significant because "racial balancing" cannot be sustained if large numbers of whites leave an "integrated" school system.

James Coleman, senior author of the *Coleman Report*, was one of the first nationally respected social scientists to publicly argue that busing contributes to white flight, resegregates minorities and the poor within the public schools, and hence is counterproductive. (6) Christine Rossell responded to Coleman by branding his contention a "fraud" and asserted that, in alleging a link between busing and white flight, he "has pulled off one of the greatest deceptions of public policy research" and "is guilty of statistical sleight of hand." (7) In an effort to counter Coleman's claims, Rossell examined student enrollment trends in 86 Northern school districts; she concluded that there was little if any evidence of white exodus.

But not all social scientists were muzzled by Rossell's heavy-handed rhetoric. Diane Ravitch illustrated problems in Rossell's statistical methodology by providing a theoretical example wherein a school district of 250,000 (200,000 whites or 80% of the total and 50,000 blacks or 20% of the total) lost 40,000 white pupils in a single year. (8) According to Rossell, the remaining 160,000 whites would comprise 76.2% of the student body and a loss of 3.8% white would presumably have been sustained. But Ravitch notes that the hypothetical district would have actually lost 20% (40,000) of its original white pupils. Ravitch concluded by recommending the assessment of enrollment shifts both in percentages and in absolute numbers of students.

There is still another educational and statistical consideration: within Ravitch's theoretical school district it can be assumed that the 20% white student body loss represents a disproportionate number of more affluent families. Put another way, in this age of inflation and job uncertainties not many families can afford to pick up and move. It seems likely that those whites who remain would be disproportionately more financially limited than those who left. If so, and as Coleman has contended, the public schools would then increasingly serve the minority and the poor. Busing would have created a fresh problem: the Carter administration is as concerned about socioeconomic segregation as racial separation. (9) Consequently, forced busing for "racial balancing" may contribute to a future need for "socioeconomic balancing."

Leading pro-desegregation authorities, largely individuals whose research was and is generously funded by government agencies and foundations, soon rallied behind Rossell. Gregg Jackson of the United States Commission on Civil Rights issued several papers criticizing Coleman's findings, praising those of Rossell. Additional support came from such busing stalwarts as Robert Green, Thomas Pettigrew and Gary Orfield. The latter's endorsement was particularly significant because of his influence in academic and governmental circles. It was Orfield who edited papers of the August 1975 "Symposium on School Desegregation and White Flight" which featured a preponderance of pro-busing academicians. Scholars interested in securing grants or consultantships should surely have noted the implications with respect to their own professional advancement: the symposium was funded by the National Institute of Education, co-sponsored by the Catholic University Center for National Policy Review and the Notre Dame Center for Civil Rights, and hosted by the prestigious Brookings Institution. Boosted by kingpins of the academic and fund-granting establishments, Rossell's findings were quickly disseminated. School board members from a number of cities called the writer asking if, as Rossell asserts, busing does not significantly contribute to white flight since this finding would influence policy decisions in their districts.

Rossell has recently reaffirmed the major conclusions of her survey but has also acknowledged some white flight which, she maintains, is checked shortly after the year of implementation. Less than normal white enrollment losses are observed, she insists, in the post-implementation years so that after four years the net effect on white enrollment is nonnegative for most school districts. (10)

Without extensive funding it was impossible to thoroughly examine data from all 86 cities in Rossell's study. But an in-depth examination within a single district was feasible. The researcher lived near Waterloo and that city was therefore selected for an in-depth assessment which provides an estimate as to the accuracy of Rossell's conclusions. For several reasons, Waterloo's desegregation should not have produced the extent of exodus which has been reported in many cities: 1) initial busing plans were formulated voluntarily by the local school board, with some pressure from the Iowa State Department of Public Instruction (DPI) 2) Coleman's findings indicated that desegregation has the most pronounced effect on white enrollments in large school districts with a fairly high proportion of minorities; the year prior to announcement of the major plan the district enrolled only 19,610 students and of these only 2,419 were black and 3) the scope of the desegregation program was small.

At the request of the Waterloo Neighborhood School Association (NSA), the experimenter provided court testimony in 1973 concerning the probable effects of the proposed local busing plan. Since then he has gathered evidence of white flight, and noted the sense of taboo that pervades the question.

Realtors talk, in private but not in public, of being unable to sell Waterloo homes to incoming residents who prefer neighborhood schools. School principals have told the experimenter that parents often decide not to buy a home in Waterloo because they cannot be given long-term assurance where their children will attend school. A black parent calls to say his children are "being destroyed" by busing. On the golf course of a Waterloo suburb, a white parent casually states that he left Waterloo not to avoid integration, but to escape busing; similar comments surface spontaneously at a social gathering in Hudson and in a Janesville meat market.

The feasibility of assessing possible white flight in Waterloo was enhanced when DPI released a report on student enrollment trends from 1970-76 in 20 Iowa cities with populations exceeding 10,000. (11) During that period, only the Waterloo school district, which has the highest proportion of minority students in Iowa, launched a major desegregation program. Thus the writer was able to compare student trends in major state school districts in such a way as to exert statistical control on such non-desegregatory influences as birth rates, suburban trends, industrial growth, job layoffs and factory closings. To gain an improved understanding of pre-1971 enrollment profiles, the writer also obtained 1966-69 enrollment figures from DPI.

Rossell's Findings and Conclusions: Some Observations

Rossell's figures on percentages of whites enrolled in Waterloo are summarized on Table 1 and appear to support her conclusion that there has been little or no white flight; the percentages of whites in the student body are relatively stable during the years she designates as pre (1968-69; 1969-70) and post (1970-71; 1971-72) major plan years.

Table 1
Waterloo School District Enrollment Trends
(as cited by Rossell)

	1968	1969	1970	1971	1972
Percentage whites enrolled	87.8	87.2	86.8	86.2	85.8
Change in percentage white		-.6	-.4	-.6	-.4

Actually, local school officials state that there is little actual fact in Rossell's figures as they are cited in Table 1. Thus Rossell contends that 1971 was the major plan date and that 1.91% (or 343) of the students were then reassigned. It is true that the "plan" was announced in 1971 but Laurence Garlock, who heads transportation programs for Waterloo, states that there was no 1971 busing for racial balance. Largely to promote desegregation, Waterloo added a third high school (Central) in 1972. This required some limited busing, which was done under the guise of "redistricting" the high schools. In 1979, school board members were predicting that Central and other schools would have to be closed because of steadily declining enrollments. Waterloo busing did not really begin until the fall of 1973 when 709 students, about half of them black, were reassigned.

Table 2 summarizes absolute numbers of white and black students enrolled from 1966-78 in Waterloo, change in absolute numbers of white students by one year intervals, percentage of whites in the student body, percentage changes in white student body compared to total student body, and percentage change in white student body. Rossell's analysis utilized only categories 5 and 6 (percentage whites in student body, percentage change in white student body.)

Table 2 shows that in 1971 16,564 white and 2,566 black students enrolled in the Waterloo schools. This represented a loss of 627 whites and a gain of 147 blacks over the prior year; whites constituted 86.5% of the student body and the percentage white of the student body declined 1.1%. However, the absolute number of whites enrolled in 1971 declined 627 or 3.65%. This table also shows that by the fall of 1978, only 12,133 whites remained; since 1970 the white student population had declined 29.4%.

A review of Tables 1 and 2 reveals important discrepencies between Rossell's figures and those which this researcher secured from state and local school officials. Thus Rossell reports no difference in white decline between what she considers the two pre- and two post-major plan years (.6 and .4 vs .6 and .4). But the percentage loss – and here we employ her doubtful index – during 1971 and 1972 was actually more than double that of 1969 and 1970 (.5% and .1% vs .1.1% and .3%). More importantly, the absolute number of white student change in the two pre-plan years was 298 (168 and 130)

Table 2

Waterloo School District Enrollment Trends*

	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978
1. Number of white students enrolled	17,369	16,918	17,489	17,321	17,191	16,564	15,913	14,798	14,162	13,760	13,419	12,810	12,133
2. Number of black students enrolled	2,182	2,225	2,322	2,408	2,419	2,566	2,534	2,576	2,545	2,561	2,552	2,585	2,381
3. Total student enrollment	19,551	19,143	19,811	19,729	19,610	19,130	18,447	17,374	16,707	16,321	15,971	15,395	14,514
4. Absolute number, white student change	–	(451)	571	(168)	(130)	(627)	(651)	(1115)	(636)	(402)	(341)	(609)	(677)
5. Percent of whites in student body	88.8	88.3	88.2	87.7	87.6	86.5	86.2	85.1	84.7	84.3	84.0	83.2	83.6
6. Percentage change white student body	–	(.5)	(.1)	(.5)	(.1)	(1.1)	(.3)	(1.1)	(.4)	(.4)	(.3)	(.8)	.4
7. Percentage change, white with white in prior year enrollment	–	(2.60)	3.38	(.96)	(.75)	(3.65)	(3.93)	(7.01)	(4.30)	(2.84)	(2.48)	(4.54)	(5.28)

* Source: Waterloo Community School personnel office.

whereas comparable post-plan figures were 1,276 or more than four times greater: (627 and 651). *

Economic Assessment

It is known that white outmigration from the cities has been going on for some time and the complexity of white flight is such that Coleman (12) and Clotfelter (13) advise the use of econometric assessment data such as that which appears on Table 3. Here, percentages are cited concerning absolute student numbers in the 20 Iowa school systems and their nearby districts from 1966 through 1976. This methodology retains the validity provided through utilization of absolute student numbers but admits a methodological weakness inasmuch as absolute numbers of students vary by district; a loss of relatively few students may yield a deceptively large percentage shift. In examining this table it should be noted that 1) only the Des Moines and Waterloo districts serve significant numbers of minority students and 2) the DPI report included Cedar Falls both as an independent district and as a suburb of Waterloo but provided separate figures for both school districts.

Table 3 shows that Waterloo's total student enrollment increased 3.07% from 1966 to 1969' This growth rate surpassed that of six cities (Council Bluffs, Des Moines, Keokuk, Mason City, Newton and Ottumwa). In fact, the district's growth during this period would have been somewhat higher were it not for a 1968-initiated voluntary busing plan whereby approximately 100 minority youth began attending the nearby university laboratory school. These figures indicate that prior to the 1970s Waterloo's racially integrated schools were maintaining steady enrollments. Despite some *de facto* racial imbalance there was no sign of significant white exodus.

It is also noted that Waterloo's total enrollment declined 18.8% from 1970-76 while student numbers in adjacent school districts gained slightly (.2%). During this period the percentage of student decline was exceeded by only two districts, Mason City and Ottumwa. Significantly, both cities are within geographic regions which experienced more widespread adverse econometric developments than Waterloo as witnessed by 1) percentage changes of 14.4% and 14.0% within the regional

Table 3

Enrollment Trends by percentile:* 20 Iowa Cities with over 10,000 population (in absolute student numbers)

	Column 1 Percentile enrollment change in school districts from 1966-69	Column 2 Percent enrollment change in school districts 1970-76	Column 3 Percent enrollment change adjacent district and one district away 1970-76	Column 4 Difference, percent enrollment in key cities and nearby districts 1970-76	Column 5 Percent Change in geographic area (includes private schools and key cities) 1970-76
Ames	+11.43	– 6.6	– 4.1	– 2.5	not given
Burlington	+ 4.78	–11.0	– 6.9	– 4.1	– 9.7
Cedar Falls**	+10.55	– 8.9	+ 0.2	– 8.7	–10.7
Cedar Rapids	+ 7.39	– 9.4	– 4.0	– 5.4	– 9.4
Clinton	+ 8.08	–15.0	+ 7.5	–22.5	– 1.7
Council Bluffs	+ 2.83	–16.2	– 0.5	–15.7	–19.4
Davenport	+ 7.90	– 3.3	+ 3.9	– 7.2	– 0.9
Des Moines	+ 1.86	–14.1	+ 6.8	–20.9	– 4.8
Dubuque	+33.98	+12.7	+ 1.5	+11.2	– 5.9
Fort Dodge	+ 3.11	–17.3	–16.1	– 1.2	–17.4
Fort Madison***	+ 7.05	–11.1	– 6.9	– 4.2	– 9.7
Iowa City	+17.02	– 6.2	– 7.2	+ 1.0	not given
Keokuk***	+ 2.08	–16.7	– 6.9	– 9.8	– 9.7
Marshalltown	+ 7.32	– 4.3	–11.8	+ 7.5	–10.1
Mason City	+ 2.85	–19.1	–11.3	– 7.8	–14.4
Muscatine	+ 9.54	– 0.6	– 4.5	+ 3.9	– 3.2
Newton	+ 0.50	–13.0	– 3.8	– 9.2	–10.14
Ottumwa	– 1.26	–19.1	–10.5	– 8.6	–14.0
Sioux City	+ 5.04	–11.7	– 9.7	– 2.0	–12.7
Waterloo (all students)	+ 3.07	–18.8	+ 0.2	–19.0	–10.7
Average of all 20 schools	+ 7.26	–10.5	– 4.2	– 5.4	– 9.7

*DPI and the Waterloo Community Schools employ slightly different statistical methods in calculating student enrollment, which do not alter any of the general findings

**Because of geographic proximity, grouped with Waterloo

***Because of geographic proximity, grouped with Burlington area and 2) percentage declines in adjacent school districts of 11.3% and 10.5%. Moreover, since practically all Iowa cities serve few minority students, it seems fair to assume that, for comparative purposes, Waterloo's white student decline would be the more appropriate figure to use and this boosts the figure from 18.8% to 21.9%.

Column 4 of Table 3 shows that the difference in 1970-76 enrollment percentages between Waterloo and nearby districts was 19% which is the third largest percentage difference among the 20 districts. Only two cities (Clinton and Des Moines) reveal greater percentage differences and in both cities this is largely linked to growth trends in adjacent areas. Further investigation is required to fully comprehend this finding, but local residents of the two cities offer possible explanations. Clinton, a relatively small town, has many retired citizens; even a small number of these could distort usual percentage interpretations. An old river town with limited land suitable for residential expansion, Clinton has attracted little new industry partly because it is bounded on one side by the Mississippi River and along other boundaries by the suburbs of Comanche and Lyons which may partially explain the 7.5% enrollment gain in adjacent districts during a period when statewide enrollment declines were being recorded. As for Des Moines, expansion in state government has spurred employment but realtors report that newcomers prefer to settle in suburbs. This may be related to long-rumored busing which was eventually implemented in the fall of 1977.

Finally, Column 5 gives total enrollment change by region and includes private schools. This table shows that the Waterloo regional loss, which includes the city's student decline, was 10.7% which is only one percentage point higher than the average decline (9.7%) of the 20 regions. Only five of the areas showed significantly less student declines than Waterloo: Clinton, Davenport, Des Moines, Dubuque, and Muscatine. Summing up, econometric indices as compiled on Table 3 do not provide an explanation for the sharp declines in Waterloo's white student population. Indeed, the 1970-76 period witnessed expanded local employment as the region's major employer, the John Deere Company, increased hiring and recorded high construction costs associated with the building of new plant facilities. Also, the existence of large tracts of suitable residential development land raises questions as to why more single homes have not been constructed recently within Waterloo.

Enrollment changes, again in absolute student numbers, for Waterloo (whites only), Cedar Falls and the area's six major suburbs are presented on Table 4. These figures show that Waterloo's enrollment held steady through 1969 but suffered unusually high losses during the 1970s, with numbers and percentages far exceeding those of nearby districts. Again, econometric information is useful. From 1970-76, the State of Iowa saw student enrollments decline 8.49%. Yet all four of the smaller Waterloo suburbs bucked this trend. Again, Cedar Falls is the exception and enrollment trends at the local University of Northern Iowa (UNI) provide a possible explanation since the Cedar Falls schools draw students from homes of both university students and staff. Consistent with observations noted on the table, during the late 1960s UNI gained students and staff; the 1970s saw declines. Thus from 1966 to 1969 UNI enrollment jumped from 7,409 to 9,058. Further gains were registered in the fall of 1970 when 9,723 university students were admitted but since that time the university's enrollment has held relatively steady.

Table 4

Student Enrollment Trends,
Greater Waterloo Geographic Area
1966-78

	Student Change in Absolute Numbers		Percent of Change	
	1966-69	1970-78	1966-79	1970-78
Cedar Falls	543	(–900)	8.64%	(–13.34%)
Hudson	23	317	3.54%	46.01%
Denver	130	78	17.96%	8.77%
Dike	43	(– 43)	6.45%	(–6.00%)
Dunkerton	51	(– 48)	7.18%	(–6.33%)
Janesville	(–12)	46	(–2.05%)	7.82%
Waterloo (whites only)	(–48)	(–5058)	(–0.28%)	(–29.42%)

Some After-Effects

By 1979 there was no sign of abatement in Waterloo's enrollment decline. Despite falling birth rates, a large new housing development was underway in Hudson, one of the suburbs, which was building a new school. Lower enrollment figures in Waterloo have prompted special school board meetings. Staff reductions have been carried out even though Federal and State funds have flowed into the district to make it a busing "showcase." Some black parents, unhappy with busing and claiming it has damaged their children, have threatened to open a private school. Proposals for school closings have been advanced but drawn criticism because they involved schools in sections of the city largely populated by the poor and minorities. Incongruities abound: in 1973 the NAACP had argued that busing would upgrade education; by 1979 it was insisting that blacks should not be unfairly burdened by busing-related hardships. This presents the board with a dilemma; busing of whites to largely black schools would probably accelerate additional white flight.

Financial problems have also been exacerbated. State aid is based on student numbers; for each student lost, the district loses $1,450. Recently the school board, in a move designed to stem student outflow, has decided to curtail and to eventually eliminate voluntary busing of minority children to the nearby university laboratory school. Voluntary busing shall therefore be sacrificed to sustain mandated desegregation which witnesses the increasing resegregation of minority and poor children.

Contrary to Rossell's well-publicized conclusions, the findings of this study indicate that white flight persists long after the year of implementation. The validity of Rossell's conclusions concerning enrollment trends in the other 85 cities included in her review must therefore also be questioned. This assessment therefore suggests that the most effective educational policies cannot be framed solely on the basis of conclusions reached by the presumably best informed, and most influential, of social scientists. One serious implication follows: corrective steps are needed to objectify social science findings or unproductive and disruptive educational practices shall be perpetuated. Just how such profound reform can be brought about provides a very real challenge. However, if reasonable progress cannot be made toward such reform, it is most unlikely that academia will progress from its present chaotic status to a unified coherence capable of promoting genuinely useful policy formulations.

FOOTNOTES

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[From "A Blueprint for Judicial Review"]

15

POSSIBLE ALTERNATIVES TO FORCED BUSING

John Ashcroft

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Three decades ago George Orwell chose *1984* as the title for his tale of a state whose brutalized subjects had come to take nightmarish repression for granted; as that year approaches, it becomes more and more tempting to polemicists of all persuasions to use its proximity as a symbol of their opponents' real and imagined excesses. It might not be entirely frivolous, however, to select from among the more bizarre of our modern social institutions the one that stands out as a measure of how close 1984 will be to Orwell's prophecy. One strong candidate for this distinction is our twenty-year experiment with mandatory long-distance transportation of children to achieve racial balance in the schools.

The mortar that held the contradictory society in *1984* together was a language in which words were used to mean their opposites. The Ministry of Peace made war; the Ministry of Love fomented hate; the Ministry of Truth promulgated lies. The institution of "verbicide," as former Senator Sam Ervin is fond of calling it, is not unknown in modern American society. It is bad enough that our courts have chosen to impose forced busing and classification of schoolchildren solely according to their race; it is even worse that they have done so under the rubric of the Fourteenth Amendment guarantee of "equal protection of the laws" and the 1954 *Brown v. Board of Education*[2] decision which had upheld the right of schoolchildren to be free from discrimination on account of race.

It is hard to know where to begin the list of things that are wrong with forced busing. It should be made clear at the outset, however, that opponents of busing are *not* complaining about the mere transportation of school children by bus. This would seem too obvious to mention but for the confusion that has been stirred up by advocates of court-imposed busing, who frequently point out that children have been riding school buses for years. Prior to the era of forced busing to achieve racial balance, children were bused because the nearest school was too far for them to walk to, or because they wished to take advantage of special educational opportunities at schools other than those nearest their homes, or—too often—because "separate but equal" school systems prevailing in some areas prior to *Brown* required them to attend one-race schools outside their neighborhoods. To state the obvious, opponents of forced busing have no argument with school buses; it is the use to which buses are put that is objectionable. The argument those who favor forced busing have voiced—that opponents of forced busing must have an "ulterior motive"[3]—is yet another example of "verbicide." Opposition to forced busing can not be equated with racism.

Here, then, are a few of our motives in opposing racial-balance busing, as summarized in a set of findings currently being considered by the United States Congress. Such forced busing:

> (1) leads to greater separation of the races by causing affected families to relocate their places of residence or disenroll their children from public schools;
>
> (2) fails to account for the social science data indicating that most racial imbalance in the public schools is the result of economic and sociological factors rather than past discrimination by public officials;
>
> (3) is not reasonably related nor necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful segregation because such segregation can be eliminated without such assignment and transportation;
>
> (4) causes significant educational, familial and social dislocations without commensurate benefits;
>
> (5) undermines community support for public education;
>
> (6) is disruptive of social peace and racial harmony;
>
> (7) has not produced an improved quality of public education;
>
> (8) debilitates the public educational system and wastes public resources;
>
> (9) unreasonably burdens individuals who are not responsible for the wrongs such assignment and transportation allegedly seek to remedy;
>
> (10) infringes the right to racially, religiously and ethnically neutral treatment in school assignment; and
>
> (11) has been undertaken without any constitutional basis or authority since the Constitution of the United States does not require any right to a particular degree of racial, religious or ethnic balance in the public schools.[4]

As the proposed congressional findings suggest, there are several general categories into which the evils of forced busing may be placed. Busing is ineffective. It results in many parents removing their children from affected public school systems, increasing racial imbalance and decreasing community support for an educational system. Busing is wasteful. It diverts vast sums of money that might otherwise be spent on increasing the quality of education.[5] But the overarching problem with racial balance busing, imposed as a remedy for the immoral and unconstitutional system of segregated schools that existed prior to 1954, is that forced busing itself is immoral and unconstitutional. This is not simply a case of the cure being worse than the disease; rather, forced busing is an attempt to cure racism and coercion with more racism and more coercion.

It is unfortunate that the racist and coercive nature of court-ordered busing has been masked by the term "reverse discrimination." The discrimination involved is not in favor of any group. It is *against* black and white children who are classified, assigned and transported according to their race. The term "reverse discrimination" implies a form of anti-discriminatory discrimination resting on the premise that a school with, say, 60% white students and 40% black students is inherently more moral than an all-white or an all-black school. Such a premise implies that recourse to a few undesirable means is permissive to achieve a stated objective. There is no such thing as a moral or an immoral percentage. What was and remains immoral is racial classification and coercion. Under the pretext of equality, racial discrimination in the United States is proceeding full speed ahead.

The courts have reversed not discrimination but the progress represented by *Brown* and by the early achievements of the civil rights movement. This reversal has resulted from the transformation of our federal courts from guardians of individual rights into balancers of class interests. The two roles are incompatible. Individual rights, while they may be limited in scope, are absolute within their boundaries; class interests, on the other hand, tend to be defined relative to other interests. In a universe full of interests to be balanced there seems little room for absolutes. During the last twenty years the federal courts have gradually transformed an individual right not to be treated by government according to one's race into a protected class interest in attending schools that are racially balanced.[6] The racial-balance interest can only be affirmed by denying the anti-discrimination right. This is the most significant evil of forced busing.

It is important to note that the courts do not acknowledge that there has been any change since *Brown*. The constitutional right that busing is said to protect is the right to be free from racial discrimination.[7] The transformation of this right into its opposite has been effected gradually. The first major step was the Court's 1968 holding that "freedom of choice" plans, in which students were free to attend the school of their choice within a school district, were unconstitutional.[8] Justice Brennan ruled that "the transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about."[9] In order for a school district to prove that its system was "unitary" and "nonracial" under this ruling, it was not enough that all racial classifications be eliminated, or even that there be no improper pressures on students or parents to choose one school over another; the only acceptable evidence was that there be no remaining "racial identification" among schools—i.e., that there be no significant percentage imbalance.[10]

Later cases established that until a formerly segregated school system had become "unitary" and "nonracial," the classification and transportation of students according to race was a required and continuing "remedy."[11] Finally, the Supreme Court announced a series of variations from the usual rules of pleading and evidence in school-desegregation cases.[12] Today, the argument goes, any act of racial discrimination in any part of a school district, no matter how isolated and how long ago, may serve as a "trigger" imposing virtually irrebuttable presumptions on school officials. Once these presumptions have been triggered, it is argued that busing will be required by the courts unless school officials can prove that *no* action was taken in the interim which had even the slightest unintended segregative effect.[13] As Justice Rehnquist has pointed out, requiring school authorities to prove such universal negatives deprives them of the "latitude to make good-faith, color-blind decisions about how best to realize educational objectives without extensive post-hoc inquiries into whether integration would have been better served—even at the price of other educational objectives—by another decision: a different school site, a different boundary or a different organizational structure. . . . Such a tight noose will invariably move government of a school system from the town hall to the courthouse."[14]

The imposition of forced busing as a "remedy" for violations of the right to equal protection does violence to the logic of that right in at least two ways. First, using racial imbalance as conclusive evidence of a continuing violation either denies that such imbalance could result from other factors such as neutrally-drawn neighborhood school district boundaries or voluntary association along ethnic lines, or treats racial imbalance itself, even where it is random or voluntary, as a substantive violation of the Constitution. Moreover, even where a constitutional violation has been established, "remedial" action focused upon innocent black and white schoolchildren hardly seems justified under an individual rights theory. Only by an *a priori* division of society into two or more classes, each of whose members may be held accountable for wrongs perpetrated by other members of the class, *and* by a redefinition of the substantive right being remedied, can busing be rationalized.

The federal courts' insistence that racial-balance busing is not a new constitutional right but merely a remedy for violations of the right to be free from racial discrimination suggests a possible source of relief. The Fourteenth Amendment, in its fifth and final section, provides that "Congress shall have power, by appropriate legislation, to enforce" the substantive provisions of the Amendment. It has been argued that Congress is thus free to prescribe remedies for violations of the equal protection clause. Supporting this suggestion is the fact that the Supreme Court has recognized that in the exercise of its power to enforce the Fourteenth Amendment the Congress may make findings of fact that certain practices result in denials of equal protection, even where the Court itself has previously found no such constitutional violations.[15] Thus it is possible that a congressional finding that busing to achieve racial balance is an ineffective, wasteful, immoral and counterproductive means of enforcing the equal protection clause together with a congressional substitution of remedies (such as neutrally-drawn district lines or genuine freedom of choice systems) might put an abrupt if overdue end to the courts' adventure in educational policymaking. Such legislation could be bolstered by a finding that racial classification, assignment and transportation themselves represent substantive violations of the constitutional rights of children. Several bills introduced in the 97th Congress would make such findings and use the power of Congress under §5 of the Fourteenth Amendment to limit or prohibit racial-balance busing.[16]

Confronted with such legislation, it is of course possible that the courts would redefine racial balance as a substantive constitutional right, or otherwise deny the power of Congress to interfere with this peculiar modern American institution. In this case, the only remedy would be to amend the Constitution. Resort to the constitutional amending process should never be taken lightly. Moreover, the process is unwieldy. Nor, indeed, should opponents of busing be forced to resort to a constitutional amendment, since the Constitution, in our view, already supports our position. Should the Supreme Court hold anti-busing legislation unconstitutional, widespread support for an anti-busing amendment can be expected. It is imperative that we return to a system under which our schools are run by state and local school authorities rather than by federal courts, and in which the quality of education rather than racial heterogeneity is the principle task of the school authorities. Time is of the essence. The education of America's future is at stake.

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2. *Brown v. Board of Education*, 347 U.S. 483 (1954).
3. *Cf. Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, (1971): "[Bus] transportation has been an integral part of the public education system for [years]. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-70 in all parts of the country. The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible. . . ."
4. S. 1641, The Neighborhood School Transportation Relief Act of 1981, 97th Congress, 1st Session. The principal sponsor of S. 1641 is Senator John East (R-NC).
5. Indeed, no catalogue of the harm done by forced busing can be complete without some reference to the far from trivial waste of fuel—a waste which, were it incidental to a more traditional and less fashionable government program, would not have escaped the attention of the federal energy bureaucracy.
6. "Twenty-five years after *Brown v. Board of Education*, the Supreme Court has assured us that the answer to the 'American dilemma' will not come through the first Mr. Justice Harlan's 'color blindness' but rather by acknowledging differences between black and whites as the basis for 'affirmative action.' That is the cumulative message of Weber, Columbus and Dayton. [Their] remedies focus not on racial discrimination but on redressing racial imbalance in the work force and the school population. They acknowledge that separate but unequal treatment under law is warranted by our history, because they deal with classes of persons and not with individuals." Kitch, *The Return of Color-Consciousness to the Constitution: Weber, Dayton and Columbus*, 1979 Sup. Ct. Rev. 1.
7. *See e.g., Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979).
8. *Green v. County School Board*, 391 U.S. 430 (1968).
9. *Id.*
10. *Id.*
11. *See e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
12. *See e.g., Columbus Board of Education v. Penick*, 443 U.S. 449 (1979) ("natural and foreseeable" disparate impact on blacks and whites is sufficient evidence of unconstitutional segregative purpose); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979) (present existence of predominantly white or black schools presumed to result from segregative acts committed in the 1950s rather than from population shifts over the intervening 25 years); *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973) (proof of segregative acts in one part of a school system is probative of systemwide violations of constitutional rights).

13. *See* authorities cited in n. 11 *supra; see also Columbus Board of Education v. Penick*, 443 U.S. 449, (1979) (Rehnquist, J., dissenting).

14. *Columbus Board of Education v. Penick*, 443 U.S. 449, (1979) (Rehnquist, J., dissenting).

15. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *See City of Rome v. United States*, 446 U.S. (Rehnquist, J., dissenting) ("The result reached by the Court today can be sustained only upon the theory that Congress was empowered to determine that structural changes with a disparate impact on a minority group's ability to elect a candidate of their race violates the 14th or 15th amendments.").

16. *See e.g.*, S. 1147, 97th Congress, 1st Session, The Racially Neutral School Assignment Act, proposed by Senator Slade Gorton (R-Wash.); S. 528, 97th Congress, 1st Session, The Neighborhood School Act of 1981, proposed by Senator Bennett Johnston (D-LA.); S. 228, 97th Congress, 1st Session, proposed by Senator William Roth (R-Del.) and Senator Joseph Biden (D-Del.). *See also* S. 1641, quoted in text at n. 4 *supra*.

Racial Classification: Politics of the Future?

L. H. GANN AND ALVIN RABUSHKA

One of America's greatest challenges concerns the question of civil rights. Past discrimination stains the pages of American history; racial discrimination persists today—albeit in a more covert fashion than in the past. The courts have taken a major part in rectifying injustice; the Supreme Court persists in the admirable endeavor to give *de facto* as well as *de jure* equality to our country's citizens.

No man of good will can quarrel with the Supreme Court's aim. But the methods currently followed may have consequences as yet unanticipated by the interpreters of our law. The Supreme Court closed its 1980 docket by upholding a federal law, passed in 1977, which requires that 10 percent of all federal works contracts be set aside for business firms operated by members of racial minorities. According to the Court's majority, Congress may discriminate in favor of some racially defined group that has suffered from prior discrimination. In the case of *Fullilove v. Klutznick*, the Court has further endorsed affirmative action programs that include minority admission on special terms to universities and job quotas set aside by employers for minorities. The Court has agreed to hear additional cases that may extend the quota principle for jobs and government subventions to minority groups.

Individual Rights

Affirmative action programs have subtly begun to change the entire tenor of American life. In the past, appointments and promotions to government service positions, government contracts, admission to universities depended—at least in theory—on individual achievement. Evasions and abuses there were aplenty. Both Catholics and Jews, for instance, once were subject to academic discrimination, not to speak of widespread and malignant discrimination against blacks. But at least the principle of individual merit went unchallenged, and after World War II became increasingly effective in its enforcement. Recent court actions, administrative decisions made by powerful bureaucrats, and the changing climate of academic opinion have helped to create a new concept of group rights of a kind familiar to countries like Northern Ireland, Lebanon, Cyprus, and the former Austro-Hungarian empire, where ethnic affinity counted as much as personal merit in the incessant competition for jobs.

Such concepts even started to affect hiring for the federal civil service. The federal government, to give an example, engages a substantial number of college graduates for higher-level positions such as customs agents and tax adjusters. Candidates for such positions used to be chosen by the so-called Professional and Administrative Career Examination (PACE) which—all the experts agreed—provided well-qualified candidates for technical jobs. For a variety of educational and sociological reasons, minority candidates performed less well—on the average—than candidates of other racial origins. Under pressure from political activists within the Carter administration and from career officials within the Justice Department, the old system was abolished; quotas were set up to achieve a 20 percent minority employment figure. (Once the Reagan administration had come to power, the quota provisions were eliminated.)

Opportunity Targets

The enthusiasm for filling quotas is also revealed in a succession of documents issued within the Department of Health and Human Services (HHS). The Department's instructions for "setting affirmative action targets under the Operations Management System" (dated April 1, 1980), and issued by the Assistant Secretary for Personnel Administration within HHS laid out, with Germanic thoroughness, the extent of "under-representation," and at the same time set up a complex system of "opportunity targets." The instructions issued contained mathematical formulations that might test the ingenuity of a doctoral candidate. For example, "to reach parity in 'T' years," the department set an equation whereby target hiring rate percentage equalled

$$\frac{d/T + L}{EOs}$$

(d = current deficiencies; L = expected loss; EOs = employment opportunities).

This directive was followed on June 3, 1980 with a memorandum issued by the Assistant Secretary for Management and Budget in HHS. Each operating section component of HHS was instructed to determine the precise percentage of "under-representation" of particular minorities and women within the GS 1-8, GS 9-12, and GS 13-15 grades of the civil service, compared with the National Civilian Labor Force. As soon as the department had decided that any group was under-represented in any particular grade, the department set for itself a percentage target to rectify the position.

Subsequent inquiries showed that there was under-representation among blacks, Hispanics, Asians, American Indians, women, and handicapped persons in one or more of the different gradings of the civil service. The investigators also found, however, a disproportionate over-representation of blacks and women in the GS 1-12 grades, which ran from double to quadruple that in the National Civilian Labor Force. However, HHS issued no directives to take over-representation into account. If the employment opportunity targets were met for particular minorities in all under-represented grades, the net result would be minority over-representation in the entire HHS staff. To be fair and to assure symmetry, blacks, women and other minority group members would have to be let go from jobs they currently hold. At least such is the implication of HHS's affirmative action targets policy.

Defining Minorities

The substitution of ethnic affinity for personal merit is a dangerous precedent. But court action raises the even more vexing question of how minority members should be defined in law. As court rulings affect an ever increasing part of the American economy, and as ever growing sums will be disbursed for the benefit of qualified minority members, the problem of defining who is, and who is not, a member of a minority will become increasingly urgent. How can unscrupulous members of the majority otherwise be prevented from claiming benefits reserved by law for minority members? If quota chiselling and quota cheating should come to parallel in extent present welfare chiselling and cheating, we shall have to rethink past assumptions.

At present, minority applicants for jobs or federal contracts identify themselves as such. But can applicants be trusted fairly to do so in the future? To ensure that only blacks, Hispanics, Asians, and Native Americans receive the benefit of court rulings, will it become necessary for the courts or the legislature to define minority members by law? Will some mechanism have to be found to select groups no longer eligible for minority classification, (say Japanese Americans, whose average family incomes now exceed the whites'), or to include new groups (immigrant Haitians, Cubans, Laotians, and Vietnamese)? Classification by race is not a new problem, and it is one that even the most explicitly racially-oriented regimes have had trouble in solving.

What fraction of black ancestry determines black eligibility? 100 percent? Three quarters? One-half? One-fourth? How important are phenotypical characteristics, such as type of hair, darkness of skin, eye color, and so forth? If a dark-skinned Appalachian with curly hair claims to have discovered his blackness, should his claim be denied? If it is to be denied, it must be on some legal criterion of racial classification to guarantee equal protection under the law.

The definition of "Hispanics" is even more difficult. Should Mr. Gomez, a native of Madrid and graduate of Spanish university, be classed as Hispanic? If so, should Mr. Gomez, born in Lisbon, be denied the same privilege? Are only those Hispanics already lawfully resident in the United States eligible for the quotas, or do the set-aside opportunities also extend to later immigrants, lawful and unlawful alike. Are Hispanics only those of Mexican and Puerto Rican extraction, or are Cubans, El Salvadoreans, and all Latin Americans eligible?

Above all, what happens to persons of mixed ancestry? Suppose, for example, that Andrew Maclean of Scottish descent, married Miss Maria Gomez, of Mexican origin. Are their children eligible under the one-half rule, even if they have blue-eyes, and speak no Spanish? How about Mr. John Alvarez, who has one Mexican grandfather? Should he be classified as "Hispanic," even though he happens to be a member of the WASP establishment in a small city in Iowa? How is descent to be traced? Through the father's line, as in traditional societies? Or would such a practice conflict with the feminists' demand for equal rights?

Racial Classification

If we are to implement our court rulings, we shall willy-nilly be forced to adopt an explicitly defined legal status of race. In the past, the Nazis developed an elaborate system of racial classification based on the Nuremberg Laws enabling the authorities to define with lunatic precision "Aryans," "Quarter Jews," "Half Jews," and "Full Jews." The Nazi scheme was, in the literal sense of the word, a matter of life or death for those caught within its chains. The Soviet Union's existing system of ethnic passports is somewhat more benign in intention; it does, however, enable the Soviet authorities to define with precision who is or is not a Ukrainian, a Jew, a Lithuanian, or a Russian—with all the attendant disadvantages that such a scheme may entail for the Soviet citizens thereby affected.

Still better known is the case of South Africa. The South Africans have much experience in dealing with the difficulties entailed by racial classification. They can and do distinguish between Mr. Andries Joubert, and Afrikaner (thus white) with dark complexion and curly hair, and his namesake, Mr. Johannes Joubert, a Colored (and thus designated non-white), despite his wholly European appearance. In the past the United States itself used a crude system of racial classification to intern Japanese Americans during World War II—despite all requirements of equity.

We do not live in Nazi Germany, the Soviet Union, or South Africa. To the man in the street, a national system of racial classification in modern-day America seems inconceivable. But if we are to implement existing court rulings we must adopt an explicitly defined status of race, despite all its inconsistencies. At present such classification need only be of a voluntary kind, applied merely to those competing for a federal contract with minority-designated job quotas or for public employment. As court rulings put millions of jobs and billions of dollars at stake, the system will, however, have to be extended to prevent "inequities" and "confusion." Racial slots moreover will have to be defined with increasing exactitude. To accomplish this task, we shall require a vast bureaucratic machine where patronage will be profitable and will surely be linked to racial politics.

We have already gone a long way on the road to racial classification. Standard Form 181 (7/80), U.S. Office of Personnel Management, FPM Chapter 298, entitled "Race and National Origin Identification" is written in a language quite familiar to a South African. Who is white? "A person having origins in any of the original peoples of Europe, North Africa, or the Middle East, except persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish cultures or origin. . . ." Who is Hispanic? "A person of Mexican, Puerto Rican, Cuban, Central or

South American, or other Spanish cultures or origins. Does not include persons of Portuguese culture or origin." Who is black? "A person having origin in any of the black racial groups of Africa, except Hispanics."

These definitions have a spurious air of exactitude. In fact they raise more questions than they solve. North Africans are classed as "white." But who is a North African—a Mauritanian, an Egyptian, a Moroccan? Some Moroccans have origin in the "black racial groups of Africa," and some have light skin, or European appearance. Are they both white? An Algerian is clearly "white" under the present classification, however swarthy his complexion. A blonde Castillian or a red-haired and blue-eyed Uruguayan, on the other hand, do not count as "white;" they rank as "Hispanics," together with Puerto Ricans of the darkest, as well as the lightest hue. A Portuguese from Braga in Northern Portugal is a "white," whereas a Gallego, born across the border in Vigo in neighboring Spain, absurdly counts as a "Hispanic." A Brazilian is "white," but not an Argentinian or a Mexican?

Identification Guidelines

All such classification schemes are bound to be absurd in their anomalies. But the trouble does not stop there. Such schemes are also bound to become increasingly complex as new ethnic pressure groups come into being, and as an expanding federal bureaucracy has more manpower available to tackle new tasks. In summer 1979, the Subcommittee on Civil and Constitutional Rights of the U.S. House of Representatives Committee on the Judiciary requested detailed information on the numbers of minorities and women serving in the federal judiciary. Despite the fact that court rulings are largely responsible for the minority data gathering requirements imposed on private institutions and other governmental agencies, the judiciary itself had never kept any records that would identify its workforce along racial lines. To collect these data for the Subcommittee, the Administrative Office of the U.S. Courts issued a series of guidelines to all courts. One particular guideline, issued on August 23, 1980, illustrates the fears we entertain. This guideline promulgated a requirement that federal court employees and judicial officers must thereafter be identified according to a listing of "race/national origin" that included the sub-groups "Arabic" and "Hebrew." The new subgroups were to be based, in the words of the circular, "on ethnic, not religious factors," a definition that would have delighted the heart of Alfred Rosenberg and other Nazi theoreticians of "racial science."

The document is a sorry "first" in American history. As Senator Moynihan pointed out, this was the first time that the federal government had ever asked that "Hebrew" employees be thus identified.[1] Fortunately, the agency's request aroused an unanticipated degree of opposition. A new circular, issued to all Equal Employment Opportunity Coordinators on September 26, 1980, thus backtracked, on the grounds that "the breakdown of the category 'white' to reflect the semitic [sic] subgroups designated as 'Arabic' and 'Hebrew' would not be necessary in the future." This information had been requested merely "in anticipation of a possibility that it might be needed in the future." The agency, however, did not even consider the possiblity that such racialist identification might be politically divisive, morally objectionable, and unacceptable to any legislature. To go further, the logic that compels a "Hebrew-Arabic" distinction among semitic peoples could force distinctions among the Irish and English, Norwegians and Danes, Poles and Czechs, until an ethnic-religious-linguistic-racial encyclopedia would be officially sanctioned.

Employee Compliance

But the racial classifier's troubles do not stop at this point. What happens when an employee refuses to classify himself in a racial fashion? Or, worse, what does an agency do when an employee deliberately furnishes a "wrong" classification. The tortured language of the "Conversion Procedures for Agencies, Attachment 1 to FPM Ltr. 298-10" from the Office of Personnel Management, dated August 17, 1980, reveals the extent of bureaucratic perplexity. If an official refuses to provide the data required by the agency, "then the agency is authorized to and will identify the employee's race or national origin as that which the agency visually perceives to be the correct classification for the employee." In other words, the agency will decide as to Mr. Lopez's "Hispanic" or Mr. Muhammed Abd al-Aziz's "white" status by looking him straight in the eyes!

If the employee provides what is evidently "wrong" information, the bureaucrat faces even greater difficulties. In such a deplorable case "the agency will counsel the employee as to the purpose for which the data are being collected, the need for accuracy, the agency's recognition of the sensitivity of the data and the existence of procedures to prevent its unauthorized disclosure." If the employee, however, proves obdurate and sticks to his chosen classification, the agency is bound to accept it. To the bureaucratic mind, however, this is a troublesome privilege; if it were to be widely exercised, it would surely wreck the entire affirmative action program which such classification schemes are designed to serve.

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[1] (*Congressional Record, Proceedings and Debates of the 96th Congress*, Second Session, v.126, 24 November 1980, no. 165)

Group Rights

If present trends continue, we may expect increasing refinements in racial classification; we may look to their increasing use; we may anticipate growing bureaucratic discretion in their application. It would be an ironic turn of fate if compliance with court rulings and administrative regulations, inspired by the most impeccably liberal sentiments, should compel us to elaborate a system of racial classification of the kind embodied in South Africa's passbook or in Nazi Germany's *Ahnenpass.*

West German law-makers have since learned from their country's unhappy past. The German armed forces, for instance, at various times in the past discriminated against Jews. Now discrimination is illegal. Jews are promoted in the German army—not through compensatory quotas—but through personal merit alone. A number of Jewish career officers are known to serve in the German military. But no one knows exactly how many, for the German constitution wisely prohibits public officials from inquiring into the citizens' racial or religious affiliation. In this country, we can profit from West Germany's example and—even more so—from our own traditions. The founders of the United States, the point bears repeating, wisely based our political institutions on individual rights. We are now drifting toward a new concept, the concept of group rights, a concept alien to the Constitution, but one increasingly acceptable to academic theory, court decisions, and administrative regulations. If this process is allowed to continue, it will inevitably lead to the fragmentation of American society, until the United States becomes a Lebanon or continental dimension. The time has come to call halt.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036

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Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review

By THE COMMITTEE ON FEDERAL LEGISLATION*

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INTRODUCTION

Central to our system of government, and to its success, is the principle of separation of powers and the elaborate system of checks and balances that prevents any organ of government from exceeding its authority or infringing the rights of the people. The federal judiciary has long played a central role in that scheme by exercising the power of judicial constitutional review—by which we mean judicial determinations, in cases properly brought by parties having standing, of whether actions by the political branches of the federal government or by the states conform with or contravene our supreme law, the United States Constitution. It is principally through the mechanism of judicial constitutional review that the Constitution's limitations on the political branches of government are enforced. Alexis de Tocqueville observed:

> "I am inclined to believe this practice of the American courts to be at once the most favorable to liberty and to public order . . . . [T]he power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies."[1]

The "barrier against tyranny" praised by de Tocqueville nearly two centuries ago is today under attack by newly powerful forces in Congress. There are pending in both houses of Congress at least 25 bills that, if enacted and upheld as constitutional, would have the effect of scrapping the federal courts' historical role in the system of checks and balances. These bills, listed in the Appendix to this Report, would divest the federal courts of all original and appellate jurisdiction to hear cases relating to (1) the constitutionality of programs of "voluntary" prayer in the public schools or other public places, (2) the constitutionality of laws or regulations affecting abortions, (3) busing as a remedy for school segregation, and (4) the constitutionality of treating men and women differently in connection with the armed forces or the draft. One bill, H.R. 114, may be read to go even further—to eliminate all federal judicial review of state court decisions.

In this Report, we do not address the merits of the various federal court decisions on these subjects that have prompted the proposed legislation, nor do we analyze the individual bills in detail. Rather, we address a question that is raised by all such proposals: Is the elimination of federal court jurisdiction to hear constitutional claims a lawful and appropriate response to judicial decisions of which a current majority in Congress disapproves? That question is fundamental to the structure of our government because, if Congress can legitimately curtail the federal courts' jurisdiction to hear constitutional claims concerning such specific issues as school prayer, abortion, and desegregation, then there is no principled limitation on Congress' power effectively to eliminate the judicial branch as a check on the other branches of the federal government or the states. By enacting any of the present bills, Congress would necessarily be claiming the power, should it so choose, to forbid the federal courts to hear *any* claim asserted under the Bill of Rights or under any other provision of the Constitution.

Although most of the proponents of these bills generally style themselves as "conservatives," our review of the historical record reveals that their proposals are *radical* in the most extreme sense of that word. They would not only cast doubt upon the abortion, school prayer, and busing decisions of the past few years, but two centuries of historical development and constitutional doctrine. For the reasons set forth below, we conclude that this radical departure from the system of checks and balances that has served our nation well for the past two centuries is unwise and probably unconstitutional. There is no precedent of enacted legislation eliminating all federal court jurisdiction to hear claims of deprivation of constitutional rights. To find any precedent for the present bills, one must look to many bills that have been proposed over the years but *not* enacted.[2] Congress wisely declined these previous invitations to tamper with our constitutional structure of government, and should decline the same invitation presented by the current bills.

Article III of the Constitution does grant Congress power to regulate the jurisdiction of the federal courts (see Part III below). But, as the following analysis shows, this power cannot fairly be construed to permit Congress to deprive the courts of jurisdiction to hear claims arising under the Constitution itself, particularly on an issue-by-issue basis. If Congress' power were so extensive, it would undo the elaborate system of checks and balances that the Framers of the Constitution so carefully crafted. First, it would upset the checks and balances among the three coordinate branches of the federal government, eliminating the judiciary as a check upon unconstitutional actions of the political branches by the simple expedient of removing their jurisdiction to consider challenges to such actions. Second, it would disrupt the allocation of power between the federal government and the states, by eliminating the power of the federal judiciary to restrain acts of the states that violate the Constitution. Third, and perhaps most significant, it would alter the constitutional balance between individual rights and majority will, since the judiciary is the only organ of government that is institutionally suited to protect the rights that our Constitution guarantees to individuals against the wishes of a strong-willed majority.

Another serious objection to legislation of the sort currently proposed is that it is undesirable to deal with complex and controversial social issues, particularly those of constitutional dimension, by eliminating the opportunity for full airing and debate in the federal judiciary. Indeed, one of the ironies of the present bills is that the constitutional interpretations with which the bills' sponsors differ would remain frozen as the supreme law of the land forever, binding upon the state courts under the Supremacy Clause[3] and the doctrine of *stare decisis*, without any possibility of change through the evolution of legal thought or a change in judicial (particularly Supreme Court) personnel.

We are not alone in voicing our alarm over the present jurisdiction-stripping proposals. In August 1981, the American Bar Association announced its strong opposition to the jurisdiction-stripping device.[4] The New York State Bar Association has issued a report that reaches the same conclusion. The substantial majority of legal scholars and former senior Government lawyers who have testified before committees of Congress—from both sides of the political spectrum—have explained their opposition to the jurisdiction-stripping proposals.[5] And a distinguished jurist, Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit, has written that the jurisdiction-stripping device

> "threatens not only a number of individual liberties, but also the very independence of the Federal courts, an independence that has safeguarded the rights of American citizens for nearly 200 years."[6]

* * *

We begin this Report with a brief description of the pending bills (Part I). We then examine in detail the role of the federal judiciary in our governmental structure (Part II) and the extent of Congress' control over federal court jurisdiction under Article III of the Constitution (Part III).

I. *PENDING BILLS TO RESTRICT FEDERAL COURT JURISDICTION OVER CONSTITUTIONAL CLAIMS*

As noted, at least 25 bills are pending in both houses of Congress that would restrict the powers exercised by federal courts in cases involving constitutional questions. While these bills to a large extent invoke the same claims to congressional power over federal court jurisdiction, the nature of the constitutional interests affected by them, and the scope of the restrictions proposed, vary substantially. The bills of which we are aware (listed in the Appendix) fall into five categories: prayer, abortion, school desegregation, sex-based military classifications, and federal court review of state court decisions.

A. *Prayer*

"Voluntary prayer in public schools and public buildings" is the subject of seven virtually identical bills in the House[7] and one bill in the Senate.[8] These bills are a response to court decisions holding that certain religious observances in public schools, whether voluntary or involuntary, violate the First Amendment's prohibition against laws establishing religion.[9] Modeled on the so-called Helms amendment introduced in the 96th Congress,[10] such bills would divest the Supreme Court and the lower federal courts of jurisdiction to hear any case that relates to "voluntary prayer" and that arises out of either "any State statute, ordinance, rule, regulation, or any part thereof" or out of any act of Congress "interpreting, applying, or enforcing" such state acts. Actions currently pending in the federal courts would not be affected by these proposals.[11]

Since each of these proposed bills applies only to the jurisdiction of the federal courts, challenges to the constitutionality of state acts relating to voluntary prayer could still be brought in state courts. State courts, like the federal courts, are bound to give full effect to the provisions of the Federal Constitution and to recognize its supremacy over state laws and regulations.[12] In addition, since the proposed legislation does not and could not purport to alter any prior federal court decisions on the subject of prayer in public schools and public buildings, state courts would still be obligated to apply existing Supreme Court precedent in ruling on future cases.

One of the pending bills would eliminate the Supreme Court's appellate jurisdiction in any case involving a state act that relates to voluntary prayer in public schools or buildings, or that relates to "the qualifications imposed by the State as a condition of teaching in the public schools of the State."[13] The latter provision would eliminate all federal appellate jurisdiction where a state law unconstitutionally imposed racial, religious, political, or other invidious qualifications for schoolteachers.

B. *Abortion*

The Supreme Court has held that certain types of laws restricting or regulating therapeutic abortions infringe women's constitutionally guaranteed right of privacy.[14] Four bills pending in the House and two in the Senate would restrict the federal courts' power to enforce these constitutional rights.

Two identical bills, H.R. 73 and S. 583, would simply forbid lower federal courts to enjoin the operation of federal or state laws that restrict abortion, pending final review by the Supreme Court.[15] In the event that the Supreme Court does not review a lower court's ruling in an abortion case, the bills would foreclose any injunctive relief. These bills would not affect the Supreme Court's appellate jurisdiction, nor would they foreclose the lower federal courts from ruling on the constitutionality of state or federal laws relating to abortion. However, by prohibiting the lower federal courts from enjoining the operation of federal or state abortion laws, the bills would in most cases remove the only effective means to enforce such rulings. It would be extremely difficult to maneuver a case through a district court, a court of appeals, and then the Supreme Court quickly enough for an abortion to be safely performed at the end of the judicial process; requiring abortion cases to be handled so hastily would place an intolerable burden on the courts.

Three other bills[16] would also divest the lower federal courts of jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in cases involving state or local laws prohibiting or regulating abortion, but would go further, in seeking to undo the Supreme Court's decisions on abortion by declaring that, for constitutional purposes, human life begins at conception. These bills, although not fully impairing the Supreme Court's appellate jurisdiction, also go further than H.R. 73 in proscribing declaratory as well as injunctive relief and in proscribing declaratory or injunctive relief even after review by the Supreme Court.

Although these bills purport to be a limitation on federal court jurisdiction, they actually represent a restriction not on the types of cases the federal courts may hear, but on the relief those courts may grant. The bills thus raise questions as to the extent of Congress' power to restrict the traditional remedies dispensed by duly constituted courts in cases over which they have jurisdiction—questions that are outside the scope of this Report.[17]

H.R. 867 more closely resembles the pending prayer bills. That bill would remove the jurisdiction of both the Supreme Court and the lower federal courts in cases arising out of either any "State statute, ordinance, rule, regulation or any part thereof" which relates to abortion, or any "Act interpreting, applying, or enforcing" any such state act.

C. *School Desegregation*

The Supreme Court has held that in certain circumstances, where public schools have been racially segregated in violation of the Fourteenth Amendment's Equal Protection Clause and where no other remedy will effectively eliminate the pattern of segregation, the Constitution *requires* that pupils be assigned and transported to schools in a manner that eliminates the unconstitutional pattern of racial segregation.[18] The only limitation upon this constitutional mandate is that "the time or distance of travel" not be "so great as to either risk the health of the children or significantly impinge on the educational process."[19] Six bills proposed in the House and one in the Senate would restrict the federal courts' jurisdiction to award this remedy even where constitutionally required.[20] Although phrased in terms of a limitation on federal court jurisdiction, these bills really limit the power of federal courts to award a particular remedy, not the power of federal courts to hear cases involving certain types of disputes.

H.R. 761 is much broader than the other bills, in that it is not confined to desegregation orders that require busing. Read literally, this bill would forbid any federal court remedy for school segregation, since any desegregation order—even one that did not employ busing—would require that individual students be assigned to a "particular school," even if the assigned school were the one nearest his home.

H.R. 869, which parallels the prayer bills in form, would deny to the federal courts jurisdiction to hear "any case arising out of" any state act (or any act interpreting, applying, or enforcing a state act) "which relates to assigning or requiring any public school student to attend a particular school because of his race, creed, color, or sex." While the intent of the draftsman was probably to eliminate federal court jurisdiction to assign students to schools on the basis of race, if the bill is read literally it would eliminate all federal court original and appellate jurisdiction to hear *any* segregation case, since even a state statute that blatantly assigned all black students to one school and all whites to another would be a "State statute . . . assigning . . . any . . . student to attend a particular school because of his race" and therefore beyond federal judicial purview under this bill.

Two other bills, H.R. 2047 and S. 528, would not prohibit the federal courts from employing busing as a remedy for school segregation. Rather, these bills would limit the circumstances in which busing may be ordered, limit the length of the bus ride, and require that alternative remedies be explored before ordering busing as a last resort.

D. *Armed Forces*

H.R. 2365 would eliminate Supreme Court and lower federal court jurisdiction to review equal protection challenges to males-only registration or induction for military service—a constitutional claim rejected by the Supreme Court after the bill was introduced.[21]

Of more concern, therefore, is H.R. 2791, which would deprive the Supreme Court and lower federal courts of jurisdiction to hear constitutional challenges not only to different treatment of the sexes in registration for the draft or induction, but also to sex-based standards for the composition of, or duty assignments in, the armed forces. While courts have generally given the military wide latitude in determining whether sex-based distinctions are appropriate, some sex-based classifications in the military, apart from the draft, have been ruled unconstitutional.[22]

These two bills raise serious constitutional problems beyond those presented by the bills previously discussed, since they foreclose federal court challenges to federal laws and regulations. The other bills primarily address federal judicial review of state acts, and at least leave the state courts as forums for judicial constitutional review. These two bills, however, might eliminate *any* avenue of judicial constitutional review, since state courts may be powerless to afford a remedy for unconstitutional actions by federal officials.[23]

E. *Review of State Court Decisions*

H.R. 114 would deny to any court "that is established by Act of Congress under Article III of the Constitution . . . jurisdiction to modify, directly or indirectly, any order of a court of a State if such order is, will be, or was, subject to review by the highest court of such State."

It is not clear whether this bill would affect the Supreme Court's jurisdiction, since the Supreme Court was created directly by Article III of the Constitution, but is organized by congressional act, or whether it refers only to the inferior federal courts. If the bill is intended to apply to the Supreme Court, it would entirely eliminate the Supreme Court's appellate jurisdiction over all state court decisions—constituting a radical curtailment of the Supreme Court's constitutional role (see Part IIB below). If, on the other hand, H.R. 114 is intended to affect only the jurisdiction of the lower federal courts, it is likely to have little impact, since the lower federal courts do not have appellate jurisdiction over state court decisions, and therefore ordinarily have no occasion to modify state court orders (except perhaps indirectly, as in habeas corpus cases).

* * *

Having briefly described what the 25 pending bills seek to do, we turn now to our analysis of the wisdom and constitutionality of the basic concept underlying them all. We consider first whether such legislation would profoundly alter the system of checks and balances upon which our constitutional government rests. We then discuss whether, in any event, Congress has the power under the Constitution to enact such laws.

II. *THE CONSTITUTIONAL ROLE OF THE FEDERAL JUDICIARY*

Such power as Congress has over federal court jurisdiction derives from two brief phrases in Article III of the Constitution. One of them, following a statement that the Supreme Court shall have appellate jurisdiction, both as to law and fact, in all cases within the broadly defined "judicial power of the United States," adds, "with such Exceptions, and under such Regulations as the Congress shall make" (Art. III, § 2). The other, providing that the judicial power of the United States shall be vested in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish" (Art. III, § 1), is the source of Congress' power over lower court jurisdiction.

To interpret these provisions, it is necessary to examine them in the context of the role of the judicial branch of the federal government in our constitutional system. Central to that system is the principle of separation of powers among the branches of the federal government as it relates to judicial constitutional review. Within that system, judicial constitutional review by the federal judiciary serves four distinct, yet interrelated, functions: (a) the federal judiciary enforces the Constitution's limitations on the power of the political branches of the federal government; (b) the federal judiciary assures the supremacy of the United States Constitution and laws vis-a-vis the states; (c) the federal judiciary protects individual rights guaranteed by the Constitution against encroachments by majority will as expressed in acts of the federal and state governments; and (d) the federal judiciary accommodates the principles of our written Constitution with the changing needs of society. We shall examine in turn each of these aspects of the federal judiciary's role and show why the proposed legislation would undermine them all.

A. *Judicial Review and the Separation of Powers*

The first three articles of the Constitution set forth the specific, limited powers granted to the three coordinate branches of the federal government: the legislature, the executive, and the judiciary. The Framers conceived of this separation of powers as the essential safeguard of the liberties of American people. Thus, in *The Federalist Papers,* Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny."[24] The doctrine of separation of powers does not require that the legislative, executive, and judicial departments be wholly unconnected with each other, but rather that they should be "so far connected and blended as to give to each a constitutional control over the other."[25] The Supreme Court has repeatedly reaffirmed these concepts as basic to our federal governmental structure.[26]

The Founding Fathers feared tyranny by a majority of the public and therefore feared tyranny by a legislature elected by that majority. Judicial constitutional review by an independent federal judiciary not beholden to the public or legislature for tenure in office or continued compensation[27] was intended by the Framers as the people's safeguard against the exercise of governmental power in excess of that conferred under the Constitution and against the invasion of the individual's rights of liberty and property.[28]

In our jurisprudence, the federal judiciary can only exercise this essential power of judicial constitutional review by declaring and applying the law in cases and controversies submitted to the courts for decision. That fundamental concept led, in 1803, to the Supreme Court's unanimous decision in *Marbury v. Madison,*[29] and Chief Justice Marshall's heretofore unchallenged declaration that: "It is emphatically the province and duty of the judicial department to say what the law is."[30] More than 150 years later, another unanimous Supreme Court, in the Little Rock school desegregation case, said of *Marbury v. Madison*:

> "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional sytstem."[31]

The function of constitutional review is allocated to an independent judiciary in order to prevent the accumulation of power in one department of the government. As Hamilton wrote in *The Federalist Papers*, it could not be expected "that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges."[32] Thus, a constitutional system that imposes limitations on the authority of the legislative branch also requires an independent branch to determine whether legislation comports with the constitutional limitations; otherwise, the legislature would have the power both to enact and to judge the law, and there would be no check on its proper exercise of its powers.[33]

Judicial constitutional review does not imply judicial supremacy, but rather rests on the foundation of legislative supremacy. As Hamilton explained, because the adoption of the Constitution expressed the people's ultimate legislative act of ratification, the courts are *obliged* to invalidate legislation that is contrary to the Constitution.[34] The function of constitutional review is safely entrusted to the judiciary not because it is the supreme branch of government, but rather because it is the weakest. As Hamilton observed, "The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated."[35] In contrast, the judiciary "may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[36]

The power of judicial constitutional review is not absolute, but is limited by the very nature of the judicial function. Courts may decide constitutional questions only when those questions must be answered to decide justiciable cases submitted to them by litigants with standing to raise such questions.[37] Hence, the judiciary does not sit in general review of legislation as it is enacted or executive actions as they are taken. Nor have the courts any power to review legislation or executive actions on their own initiative. Rather, judges must wait for the necessity of constitutional review to be thrust upon them by litigants whose interests are adversely affected by conduct claimed to be unconstitutional.[38] This limitation is expressed in Article III's definition of the judicial power as extending only to "cases" and "controversies."[39]

The Founding Fathers were not unmindful of the possibility that the judiciary, like the other two branches of government, might be tempted to exceed its constitutionally circumscribed role. Hamilton conceded the possibility that judges, in construing a statute, "may substitute their own pleasure to the constitutional intentions of the legislature." But such action would be improper, for the "courts must declare the sense of the law"; they may not exercise "will" instead of "judgment."[40] Thus, Hamilton acknowledged the need for judicial accountability, but stressed that the "precautions" for the "responsibility" of the federal judiciary were to be found *only* in the Constitution's provision for impeachment. That device, he wrote, was "the only provision on the point which is consistent with the necessary independence of the judicial character."[41]

Hamilton characterized as "a phantom" any feared danger of judicial encroachments on legislative authority.[42] To him, not only was the judiciary a comparatively weak branch of government, but there was also

> "the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the

other, would give to that body upon the members of the judicial department. This is alone a complete security."[43]

If, as the Framers thus believed, the judicial branch is the only realistic check to prevent the political branches from exceeding their constitutional powers,[44] then it must follow that Congress' power to regulate federal court jurisdiction cannot be so broad as to enable Congress to divest the courts of the function of judicial constitutional review, as the bills currently under consideration would do. In the system explicated by the Framers, Congress could not have the power to make any statute review-proof by the simple expedient of divesting all federal courts of jurisdiction to hear a challenge to it. Even more abhorrent to that scheme is the notion inherent in the current bills, that a simple majority of Congress may eviscerate judicial constitutional decisions with which that majority disagrees merely by stripping the federal courts of power to consider such cases in the future. To conclude that the Framers viewed the judiciary as the fundamental check upon excesses by Congress, but also gave Congress the power by simple majority to nullify that check, is, in the words of a recent commentary, "to charge them with chasing their tails around a stump."[45]

B. *Judicial Review and the Supremacy of Federal Law*

Federal judicial review of state laws and acts is as important to our federal system as review of federal laws and acts. Yet most of the bills now under consideration are aimed primarily at restricting this form of judicial review.

The Supremacy Clause provides that the United States Constitution, and all federal laws enacted pursuant thereto, are the "supreme Law of the Land."[46] The federal judiciary, especially the Supreme Court, is the Constitution's mechanism for enforcing the Supremacy Clause vis-a-vis the states.[47]

Many constitutional scholars believe that the Supreme Court's most important role in our constitutional system is assuring that federal law, and particularly the Constitution, is interpreted uniformly throughout the nation. In this view, the notion of a single supreme Constitution would be rendered virtually meaningless if it could be interpreted to mean different things in different states.[48]

Professor Charles Black has written:

> "There is nothing in our entire governmental structure which has a more leak-proof claim to legitimacy than the function of the courts in reviewing state acts for federal constitutionality."[49]

And Justice Holmes stated:

> "I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that determination as to the laws of the several states."[50]

These views echo those of the Framers. A major criticism of the Articles of Confederation was the weakness of the national government and the consequent disharmony among the states.[51] Hamilton regarded it as essential that, in a national union, there be a national judiciary to assure uniform interpretation of national laws:

> "If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of the uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."[52]

Hence, the Framers understood that the supremacy of federal law can only be effected if there is a single tribunal with the ultimate responsibility for deciding what the law is. As Hamilton wrote:

> "To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice."[53]

Even those at the Constitutional Convention who emphasized the independence of the states in the proposed federal system and wished to minimize the scope of the federal judiciary acknowledged that such independence was limited by the requirements of the Constitution and federal law, and that the federal judicial branch had the authority to interpret the Constitution and the laws. For example, John Rutledge of South Carolina argued at the Constitutional Convention:

> "The State Tribunals might and ought to be left in all cases to decide in the first instance, *the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments*."[54]

Over nearly two centuries, Congress has consistently recognized the necessity of appellate jurisdiction in the Supreme Court over state court decisions as the primary means of enforcing the Supremacy Clause. From the Judiciary Act of 1789[55] through the present Judicial Code,[56] Congress has always preserved the Supreme Court's appellate jurisdiction to consider whether state acts contravene the Constitution or federal laws enacted pursuant thereto.[57]

The debate over the first Judiciary Act is instructive. Although the First Congress continued the Constitutional Convention's debate over the desirability of creating inferior federal courts, the necessity of the Supreme Court's having appellate jurisdiction to assure national uniformity was not questioned.[58] Even those who "were anxious to give the Federal Courts as little jurisdiction as possible" acknowledged that state court decisions on questions of federal law must be "subject to Federal revision through the appellate power of the United States Supreme Court."[59] The universal acceptance of federal judicial constitutional review over state acts and court decisions sheds light on the intent of the Constitution's Framers, for the Judiciary Act of 1789 was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[60]

Following passage of the Judiciary Act of 1789, leading Supreme Court decisions have consistently expounded the importance to our system of constitutional federalism of federal judicial review over state acts. As one scholar observed:

> "From an early date the Supreme Court itself has explicitly recognized that its indispensable functions under the Constitution are to resolve conflicting interpretations of the federal law and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority."[61]

Justice Story's opinion in *Martin v. Hunter's Lessee*[62] reaffirmed the Supreme Court's essential role in securing a uniform system of law throughout the United States by holding that its appellate jurisdiction applied to all cases specified in Article III, whether those cases arose in state or federal courts. That landmark opinion emphasized

> "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things

> would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. . . . [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils."[63]

These principles have never been seriously questioned. In *Cohens v. Virginia,*[64] Chief Justice Marshall's opinion, upholding the Supreme Court's authority to review a state court criminal conviction that involved interpretation of a federal statute, stated that

> "the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved . . . .
>
> "[The Constitution's Framers] declare that in such cases the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction."[65]

In *Ableman v. Booth,*[66] the Supreme Court reiterated that the Supremacy Clause requires a single federal tribunal to make a final determination as to the laws of the United States and the Constitution, "for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place . . . and the government of the United States would soon become one thing in one State and another thing in another."[67]

In the face of these clear Supreme Court pronouncements, Congress has never disturbed the Supreme Court's appellate jurisdiction to hear federal constitutional challenges to state acts, either broadly or as to specific issues. To do so now, as proposed in the bills here under consideration, would violate the spirit, if not the letter, of the Supremacy Clause by eliminating the only federal means for enforcing it, and would run counter to a consistent line of historical authority affirming the Supreme Court's central role under that clause.

C. *Judicial Review and Individual Rights*

The pending bills strike most directly at the third basic function of judicial constitutional review: protecting individual rights against abridgement by majority rule as expressed through the political branches of government.

Majority rule is not the *only* rule in the United States. Rather, our Constitution guarantees specific rights to individuals—freedom of speech, free exercise of religion, equal protection of the the law, and due process of law, to name a few—against infringement by majority will expressed as through the political branches of government. As the Supreme Court stated nearly 40 years ago in *West Virginia State Board of Education v. Barnette*:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[68]

And as James Madison wrote much earlier:

> "[I]n our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."[69]

Hence, the Founding Fathers recognized that the exercise of fundamental rights, and the individuals who exercise them, would not always win public favor, and that, from time to time, a substantial and vocal majority of the public might clamor to abridge them in certain instances. Were this not so, there would be no reason to enjoin the infringement of these rights in the Constitution.

Institutionally, the federal judiciary is the only organ of government that can be counted upon to protect individual rights when they are pitted against the will of the majority. That was why Article III, Section 1, of the Constitution made the judiciary independent of public favor by giving judges lifetime tenure and undiminished compensation throughout their judicial service.[70] It was thus intended that the courts should be free to render unpopular decisions that thwart the current majority's will when the law, as the courts interpret it, so requires.

The central role of the federal courts in protecting individual rights from encroachment by the majoritarian branches of government has been repeatedly acknowledged.[71] Chief Justice Hughes wrote in 1927:

> "In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interests or prejudice."[72]

Similarly, Justice Frankfurter, while a professor of law at Harvard, wrote:

> "The Supreme Court is indispensable to the effective workings of our federal government . . . . I know of no other peaceful method for making the adjustments necessary to a society like ours—for maintaining the equilibrium between state and federal power, for settling the eternal conflicts between liberty and authority—than through a court of great traditions free from the tensions and temptations of party strife, detached from the fleeting interests of the moment."[73]

And Justice Black observed that our federal courts "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[74]

While most commentators have emphasized the courts' role as protectors of personal liberty (freedom of speech, religion, privacy, and the like), equally important is the courts' role as guardians of private property.[75] The courts are the people's only means of enforcing the Fifth and Fourteenth Amendment prohibitions against the taking of private property for public use without just compensation and the deprivation of a person's property without due process of law.

Given the historic swings of the political pendulum, it is not inconceivable that a majority of the people of the United States, or of just one state, might someday elect a socialist government, as has already occurred in Western Europe. Should that government embark on a program that included nationalization of major industries or redistribution of private property, the judiciary would be the only institution sufficiently independent to protect the rights of private property guaranteed by the Constitution in the face of public clamor. But if the 97th Congress can legitimately curtail the federal courts' jurisdiction to adjudge selected constitutional claims, as now proposed, then a future Congress, by simple majority, could as easily eliminate the courts' jurisdiction to hear claims based on government seizures of private property without due process or just compensation.[76]

The federal judiciary's historic role as guardian of the rights of personal liberty and property guaranteed by the Constitution should not be cast aside simply because, as the Framers intended, courts sometimes render opinions that are unpopular. It is no secret that the bills presently under consideration were prompted by controversial judicial decisions—banning prayer from public schools, imposing busing as a means of integrating public schools, and permitting abortions—that are extremely unpopular in many quarters. Whether or not one agrees with the courts' decisions in these cases, it is clear that the courts were acting in their constitutional capacity as the protector of individual rights guaranteed by the Constitution. It would ill serve the long-term stability of our form of government, and would probably be unconstitutional, for Congress now to claim the power to curtail the federal courts' jurisdiction to perform this essential constitutional function.

D. *Judicial Review and Constitutional Development*

A final objection to the practice of divesting the federal courts of jurisdiction to hear constitutional claims is that it would stultify the development of constitutional law. Our Constitution is more than the words put on paper some two hundred years ago; rather, it is a living document that grows and adapts with the experience of our people.[77]

The meaning of laws, and particularly the meaning of constitutional provisions, is not always a bright-line truth, especially as it may be applied to factual circumstances never envisioned by the Framers. For example, radio and television did not exist at the time that the First Amendment was drafted, nor indeed for most of the Amendment's history. Yet, although the technological advances raise questions of access and other matters not present in the case of other forms of publication such as newspapers, the courts have applied the principles of the First Amendment to these new means of communication.

The federal judiciary has been the primary instrument for reflecting such growth and adaptation in constitutional doctrine. Thus, one of the ironies in proposals like the present bills is that the very judicial decisions that were so unpopular that they spawned such bills would become frozen in the law forever. If the federal courts are divested of jurisdiction to engage in the normal processes of change through the development of new legal doctrine, shifts in social conditions, or turnover of judges (especially Supreme Court Justices), and if state courts continue to follow federal constitutional law, as they are required to do under the Supremacy Clause, the current state of the law on abortions, school prayer, and busing will be preserved, subject to change only by constitutional amendment.[78]

In cases where a bright-line result is not immediately apparent, the interplay between the courts and Congress and among the different courts throughout the country is an important process in the development of the law. Silencing the federal courts to speak on such issues by withdrawing their jurisdiction would deprive the nation of this important element in the lawmaking process and would be grievously unwise. Not only would the creative interplay between the inferior federal courts and the Supreme Court be lost, but so too would the interplay between the federal courts and the state courts. Three years ago, this Committee, commenting upon proposals to abolish diversity jurisdiction, stated:

> "The *Erie* requirement that federal courts apply state substantive law in diversity cases has resulted in a continuous flow between the federal and state systems of both procedural and substantive reforms. . . . Elimination of such cross-fertilization could have significant adverse effects on the general character and competence of the two systems."[79]

This process of cross-fertilization is all the more important in the realm of the basic constitutional issues, which the pending bills propose to remove from the jurisdiction of the federal courts.

III. *THE EXTENT OF CONGRESS' AUTHORITY UNDER ARTICLE III*

Given the federal judiciary's essential role in our system of checks and balances, its basic function of enforcing the Supremacy Clause, and its task of protecting individual rights, does it stand to reason that Congress has the constitutional power to curtail those functions by limiting the courts' jurisdiction as the proponents of the current bills contend? It is with that question in mind that we now examine the Constitution's provisions granting Congress a measure of control over federal court jurisdiction, which are cited as the constitutional authorization for most of the pending bills.

Congress' power to regulate the jurisdiction of the federal courts is conferred by Article III of the Constitution (emphasis added):

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish.* The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> "Section 2. . . .
>
> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned [within the judicial power of the United States], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*"[80]

Historically, the federal judiciary has never exercised jurisdiction as broad as the full judicial power defined in Article III. From the Judiciary Act of 1789 onward, statutes defining the jurisdiction of the Supreme Court and lower federal courts have never utilized the entire reach of the "judicial power" defined in Article III, Section 2, and the courts have never claimed jurisdiction to reach the categories of cases outside the statutory definition. To cite two contemporary examples, (1) no federal court has original jurisdiction to hear diversity claims that do not meet the statutory jurisdictional amount,[81] even though there is no such limitation on diversity jurisdiction in Article III; (2) the Supreme Court does not have appellate jurisdiction over diversity cases tried in the state courts that do not involve a federal question, [82] even though such jurisdiction would be within the reach of Article III.

On the other hand, since the Judiciary Act of 1789, statutes defining federal court jurisdiction have regularly conferred broad jurisdiction upon the federal judiciary within the definition of "judicial power" contained in Article III of the Constitution. Congress has not sought to use its power over federal court jurisdiction to erode the judiciary's central role in interpreting the Constitution and federal law or in exercising the responsibility of judicial constitutional review. Nor has it previously attempted to define federal court jurisdiction in terms of substantive issues, as opposed to neutral principles such as citizenship of the parties or amount in controversy. Because of this, there has been little occasion for the courts to consider the metes and bounds of Congress' control over federal court jurisdiction.[83] Most of the statements in judicial opinions concerning the extent of Congress' power over federal court jurisdiction are therefore dicta, and cannot be viewed as controlling doctrine.[84]

This much, however, seems clear: There is no support, from the debates surrounding the adoption of Article III or otherwise, for the proposition that the Framers intended Article III to confer upon Congress power to strip the federal courts of jurisdiction to hear constitutional claims or to abrogate the federal courts' essential function of judicial constitutional review in response to unpopular, or even erroneous, judicial decisions.[85] Nor is there authority for the proposition that Congress' power to regulate jurisdiction may be used as an indirect means of undermining judicial opinions with which Congress disagrees.[86]

The statements in *The Federalist Papers* that the power of impeachment was intended to be the *only* check on the federal judiciary[87] strongly indicate that the Framers never intended Congress' Article III control over jurisdiction to be so used. Rather, read in context, it appears that Congress' regulation of federal court jurisdiction was intended solely to permit Congress, through policy-neutral criteria, to allocate judicial business among the federal courts, to prevent the federal courts from becoming overburdened by cases that do not involve substantial federal claims, and to provide orderly procedures for the federal judiciary's exercise of its jurisdiction.[88] This view is supported by the manner in which Congress has actually exercised its Article III powers to regulate federal court jurisdiction since the beginning of the Republic; Congress has never curtailed the courts' jurisdiction to adjudicate constitutional claims as proposed in the jurisdiction-stripping bills.

The unprecedented nature of the bills here under consideration poses serious doubts about their constitutionality as well as their wisdom. While the manner in which Congress has historically exercised its jurisdictional power cannot alter the Constitution's grant of that power, it can illuminate the proper meaning of that grant. As Justice Frankfurter explained:

> "The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply imbedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[89]

* * *

We turn now to specific consideration of the constitutional language relied upon as authority for enactment of the pending bills. Since Congress' power over Supreme Court and lower court jurisdiction depends upon different provisions of Article III, those provisions must be analyzed separately.

A. *Supreme Court Jurisdiction*

The Constitution confers original jurisdiction upon the Supreme Court in a relatively narrow range of cases involving diplomatic personnel or in which a state is a party.[90] Congress can neither add to nor subtract from the original jurisdiction thus conferred.[91]

The Supreme Court's most important role in our system is thus as an appellate court, hearing appeals from both inferior federal courts and state courts on issues of federal constitutional, statutory, and administrative law. As discussed above (Part II), the history of the Constitution indicates that the Supreme Court was intended to be the final arbiter of federal law; to review the constitutionality of acts of Congress and federal executive actions; to review the constitutionality of state enactments in light of federal statutory and constitutional law, thereby serving as the primary instrument for enforcing the Supremacy Clause; and to protect individual rights from encroachments by the majoritarian branches of the federal and state governments.

Such power as Congress has over the Supreme Court's appellate jurisdiction is conferred by the Exceptions Clause of Article III, Section 2, which grants such jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." If Congress has authority to restrict the Supreme Court's appellate jurisdiction to hear constitutional claims, as proposed in the pending bills, it must derive from this clause.

Those who advocate such authority for Congress contend that the Exceptions Clause, read literally, gives Congress plenary power over the Supreme Court's appellate jurisdiction. One answer to this contention is that the Constitutional Convention voted down a proposal that would have expressly given Congress such plenary power. In the course of the Constitutional Convention's consideration of Article III, a motion was made to replace a provision that was substantively identical to the Exceptions Clause as enacted with the following language: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct." The Convention rejected this proposal, and instead adopted the Exceptions Clause in its present form.[92]

Moreover, while such a literal reading of a single phrase might be acceptable in construing a detailed regulatory statute, it is not appropriate in constitutional interpretation. In the words of Chief Justice Marshall, "we must never forget, that it is a constitution we are expounding."[93] It is thus axiomatic that the Constitution necessarily must be read as a broad outline of our system of government, and its individual provisions must be read in the context of the organic whole.[94] Proper interpretation of the Constitution requires consideration of its spirit, as well as its letter, and the spirit should control over an interpretation that would defeat an essential tenet of the Constitution, such as the doctrine of separation of powers.

Accordingly, the Exceptions Clause must be read in the context of the broad language of Article III establishing the judicial power of the United States. It would be curious drafting, and contrary to established principles of constitutional, statutory, *and* contractual construction, if an "exception" in the third paragraph of the Article were read to grant to Congress the power totally to efface the Supreme Court's appellate jurisdiction granted in the same Article—especially in the absence of any historical evidence that this clause was intended to permit, at Congress' option, a radical diminution of the constitutional role of the Supreme Court.

There was no discussion in the Constitutional Convention of any such far-reaching effect to be attributed to the Exceptions Clause. Nor was there any suggestion of any such significance in the preparation of earlier drafts of the Constitution.[95] Although the clause was debated at the Constitutional Convention, the point at issue was the scope of the Supreme Court's appellate jurisdiction with respect to matters of fact, which some considered to be an infringement of the cherished right to a trial by jury.[96] As Hamilton observed, "The propriety of this appellate jurisdiction has scarcely been called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact."[97] As one constitutional scholar has noted, the debate ended in a compromise that left the First Congress to struggle with the scope of the Supreme Court's appellate jurisdiction over factual determinations under the Exceptions Clause:

> "So complicated were the varying practices [of review of facts] that it was concluded to leave the problem for handling by the Congress through the medium of the 'exceptions' clause, fashioned to meet the 'principal criticism' of the appellate jurisdiction, its inclusion of matters of 'fact.' "[98]

In his well-known "Dialogue," Professor Hart rejected as "preposterous" the notion that the Exceptions Clause might be read "as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether."[99] According to Hart, the measure of Congress' power over the Supreme Court's appellate jurisdiction under the Exceptions Clause "is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[100] As Professor Ratner pointed out, this interpretation of the limits of the Exceptions Clause is buttressed by legal usage known to the Framers when the Constitution was drafted, by which an "exception" cannot be construed to nullify the rule that it limits or to negate an essential part of what was granted.[101]

Judicial precedent on the scope of Congress' power under the Exceptions Clause is not illuminating. As noted above, because Congress has never challenged the Supreme Court's jurisdiction to hear constitutional claims, there are no definitive rulings on the extent or limits of Congress' power.[102] While some cases contain extravagantly broad statements concerning Congress' power over the Supreme Court's jurisdiction, [103] the statements are dicta, for the cases did not involve any attempt by Congress to limit the Court's jurisdiction to hear constitutional claims.[104] Only two Reconstruction-era cases, *Ex parte McCardle*[105] and *United States v. Klein,*[106] actually addressed the scope of Congress' power under the Exceptions Clause, and they point in opposite directions.

Those who urge that the Exceptions Clause gives Congress plenary power to divest the Supreme Court of appellate jurisdiction most often cite *Ex parte McCardle* as the leading authority for this view.[107] In 1867, William H. McCardle, a newspaper editor in Mississippi, had been arrested by the army pursuant to the Military Reconstruction Act[108] passed earlier the same year, which subjected the South to federal military command. Based upon anti-reconstructionist editorials McCardle had published, he was charged with libel, disturbing the peace, inciting insurrection, and impeding reconstruction. He petitioned the federal circuit court for a writ of habeas corpus, challenging the constitutionality of the Military Reconstruction Act, under a Habeas Corpus Act passed by the same Reconstruction Congress in 1867.[109] There was some irony in this: the 1867 Habeas Corpus Act was passed for the purpose of advancing reconstruction by expanding the federal courts' powers to release former slaves and others who were being unlawfully held prisoner by the southern states.[110] But the terms of the statute were not confined to prisoners in state custody, and McCardle, an anti-reconstructionist, was using it as a device to challenge the very reconstruction that the act was intended to promote.

The circuit court denied McCardle's petition, and he appealed to the Supreme Court under a provision of the 1867 Act. The Government moved to dismiss the appeal, and the Supreme Court denied the motion.[111] The Government then faced the prospect that the Supreme Court, on reaching the merits, might declare one of the cornerstones of reconstruction policy to be unconstitutional. To avert this threat, while McCardle's appeal was still pending, Congress repealed the provision of the 1867 Habeas Corpus Act that allowed a direct appeal to the Supreme Court.[112] In light of that repeal, the Supreme Court dismissed the appeal in a terse opinion, containing the following language relied upon by proponents of the current bills:

> ". . . The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

> "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[113]

In reading *Ex parte McCardle*, it must be borne in mind that the opinion was written under the most intense imaginable pressure at the peak of radical Reconstruction. As one commentary has noted, "With troops in the streets of the capital and the President of the United States on trial before the Senate, a less ideal setting for dispassionate judicial inquiry could hardly be imagined."[114] And as Justice Douglas once observed, "There is a serious question whether the *McCardle* case could command a majority view today."[115]

Moreover, the full *McCardle* opinion shows that it does not support so broad a view of Congress' power over the Supreme Court's jurisdiction as the above-quoted excerpt might suggest.[116] While the opinion terms the 1868 repealer act an "exception" to the Court's appellate jurisdiction, in fact the repealer merely withdrew a *procedure* for appealing to the Supreme Court under the 1867 Habeas Corpus Act enacted the preceding year. The repealer did not narrow the Supreme Court's *subject matter* jurisdiction—that is, it did not limit the kinds of claims that the Supreme Court could hear, assuming they came to it by an available route.[117] The *McCardle* opinion made this very point:

> "Counsel seems to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction

> any cases but appeals from Circuit Courts under the act of 1867. *It does not affect the jurisdiction which was previously exercised.*"[118]

The Supreme Court made the distinction even plainer later the same year in *Ex parte Yerger.*[119] There, the Court considered another appeal by another anti-reconstructionist newspaper editor held in military custody under the Military Reconstruction Act. Like McCardle, Yerger was charged with impeding reconstruction. Like McCardle, he petitioned a circuit court for a writ of habeas corpus under the Habeas Corpus Act of 1867. The circuit court denied Yerger's petition, and Yerger sought review by the Supreme Court. But unlike McCardle, Yerger invoked the Supreme Court's appellate jurisdiction under the procedures provided by the Judiciary Act of 1789, not the repealed provision for direct appeals of the Habeas Corpus Act of 1867. The Supreme Court held, over objection by the Government, that it had appellate jurisdiction under the prior law to hear appeals in habeas corpus cases brought under the 1867 Act, and that this jurisdiction was not affected by the 1868 repealer act.[120] Significantly, the Court intimated that any attempt through legislation to remove entirely the Supreme Court's appellate jurisdiction in habeas corpus cases would strike at one of the Court's essential constitutional functions and raise serious constitutional questions.[121]

United States v. Klein,[122] the second case to address directly Congress' authority to legislate exceptions to the Supreme Court's appellate jurisdiction, was decided three years after *Ex parte McCardle.* That opinion disposed of any remaining impression that the Exceptions Clause gave Congress plenary power to deprive the Supreme Court of appellate jurisdiction. A Civil War statute authorized suits in the Court of Claims to recover captured property by owners who were loyal to the Union or had been pardoned by the President. Klein had received a pardon that recited his previous disloyalty. Based upon his pardon, Klein brought an action in the Court of Claims and recovered judgment under the statute. While an appeal to the Supreme Court was pending, Congress passed a statute purporting to deprive the Court of Claims and the Supreme Court of jurisdiction in any case where a presidential pardon recited disloyalty and to direct that any such case be dismissed. The Supreme Court held that this was an attempt to prescribe a rule of decision in cases before the judiciary, violated the principle of separation of powers, and was not a permissible use of Congress' Article III powers over jurisdiction.[123] The Court opined:

> "It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . .
>
> "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.
>
> "It is of vital importance that these powers be kept distinct."[124]

The power claimed in the present bills to divest the Supreme Court of appellate jurisdiction to hear constitutional claims goes well beyond anything Congress has done in the exercise of its Article III powers at least since the turbulent Reconstruction era. Since the pending bills erode the Supreme Court's essential role in our constitutional system of government, they cannot be found to be within Congress' power under the Exceptions Clause of Article III in the absence of compelling authority. But that authority is not to be found in the history of Article III, judicial decisions under that Article, or the weight of scholarly authority concerning the Article's intent.

B. *Lower Court Jurisdiction*

The foregoing analysis shows that Congress' power to regulate the Supreme Court's jurisdiction under Article III does not give Congress power to withdraw the Supreme Court's jurisdiction to hear constitutional claims. The issue of Congress' power under Article III to divest the lower federal courts of jurisdiction to hear constitutional claims presents a closer question. However, taking into account other provisions of the Constitution and considerations of sound policy toward the judiciary, the case against the jurisdiction-stripping proposals as applied to the lower federal courts is no less compelling.

1. *Article III*

Congress' control over lower court jurisdiction derives not from the Exceptions Clause, but from its power under Article III, Section 1, to "ordain and establish" courts inferior to the Supreme Court.[125] One early view, expressed by Justice Story,[126] was that Article III *required* Congress to establish lower federal courts to exercise original jurisdiction in all cases within the constitutionally defined judicial power, other than those in which the Supreme Court had original jurisdiction. Under this view, Congress' discretion was limited to deciding where, what number, and what character of lower federal courts to establish, and how jurisdiction should be allocated among them.[127]

The premise underlying this view—that the entire judicial power defined by Article III must be vested in the federal judiciary—has since been rejected.[128] Indeed, Justice Story's position ignored the historical evidence that the Framers were divided as to the desirability of establishing any lower federal courts and intended to leave that decision to Congress.[129]

The prevailing view has been that the Constitution gives Congress absolute discretion as to whether to establish any lower federal courts. From this it is said to follow that Congress has plenary control over the jurisdiction of such lower courts as it chooses to create.[130] Some modern scholars have questioned the premise underlying this view, arguing that federal courts of original jurisdiction are now necessary to carry out the Constitution's plan for the federal judiciary. Professor Eisenberg argues that, because of the proliferation of federal law and federal court caseloads since the Framers' era, lower federal courts have become a constitutional necessity to administer federal justice; he argues that, if the federal courts were abolished and their cases turned over to the state courts, the burden of harmonizing conflicting interpretations of federal law by the 50 state court systems and vindicating federal rights would be more than the Supreme Court, exercising its appellate jurisdiction, could bear.[131] Professors Redish and Woods argue that lower federal courts are constitutionally necessary to restrain unconstitutional acts by federal officials, since state courts are generally without power to award relief in such cases.[132]

Whether or not it was constitutionally required to do so, the First Congress did establish a system of lower federal courts in the Judiciary Act of 1789, and Congress has since then consistently endowed those courts with a broad measure of the judicial power defined in Article III. The lower federal courts have long had original jurisdiction over diversity cases and cases arising under the Constitution and federal laws. Exercising that subject matter jurisdiction, the lower federal courts have been important instruments of judicial constitutional review, although their role in enforcing the Supremacy Clause vis-a-vis the states is not so central as that of the Supreme Court. Congress has never before enacted legislation to deprive the lower federal courts of jurisdiction to hear cases arising under the Constitution generally, nor on an issue-by-issue basis, as proposed in the pending bills.

The lower federal courts play a vital role as courts of first instance in which federal rights can be vindicated. In *Mitchum v. Foster*,[133] the Supreme Court reaffirmed this role in tracing the history of 28 U.S.C. § 1983 to its origin in the Civil Rights Act of 1871. The Court noted that this provision "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."[134] The Court continued:

> "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from un-

> constitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' . . . And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. *Ex parte Young*, 209 U.S. 123; cf. *Truax v. Raich*, 239 U.S. 33; *Dombrowski v. Pfister*, 380 U.S. 479."[135]

For individuals seeking to enforce federal rights, the ability to bring suit in a federal forum rather than a state court is significant. As a leading study by the American Law Institute concluded, "federal courts are more likely to apply federal law sympathetically and understandingly than are state courts."[136]

An important advantage of the lower federal courts over most state courts in protecting constitutional rights is the independence of federal judges from political influence, based upon their appointment for lifetime terms and their guarantee of undiminished compensation.[137] Judge McGowan of the D.C. Circuit saw the lower federal courts' role in desegregating the public schools as a prime example of that advantage:

> "[I]s it conceivable that the job could have been entrusted entirely to the state courts, bearing in mind the differences in loyalties and the vulnerability to local pressures inherent in an elective system of judges? The federal judges themselves have, even with the security provided them by the Constitution, found the going hard. It is not fanciful to think that it would have been too much for unsheltered state judges . . . . Certainly it would have been hard to ask them to risk such an exposure with so few shields."[138]

Another important role of the lower federal courts is to develop a body of empirical evidence that the Supreme Court can later use in formulating constitutional doctrine. The Supreme Court will often permit a difficult issue to germinate among the lower courts before it accepts a case to resolve the issue.[139] From that process of grappling with a thorny issue through several different cases in different courts, a more judicious final resolution may result—or, at least, the areas of uncertainty and disagreement may be crystallized. Then, when the Supreme Court announces doctrine, it often does so in broad terms, leaving to the lower federal courts the task of fashioning from that doctrine decisions in concrete cases. As Judge Craven of the Fourth Circuit explained, the Supreme Court

> "quite sensibly is willing to take the time to allow the inferior courts to experiment with words, giving content and meaning to the doctrine which has been expounded. The truth is that the Court is wise enough to know that it does not know precisely what ought to be done and must be required. Like the rest of us, the Court learns from experience—the experience of the inferior federal courts. Trial balloons constantly soar aloft from the United States District Courts. Some are shot down in flames by the United States Circuit Courts of Appeals, while others are allowed to orbit indefinitely."[140]

In sum, the lower federal courts have historically played a vital role in vindicating constitutional rights and in promoting national uniformity in the interpretation of the Constitution and the federal laws. The federal courts have successfully functioned side-by-side with the state courts. As a practical matter, the proposed limitations on the lower federal courts (even assuming that an avenue of review by the Supreme Court were left open) would so inundate the Supreme Court as the sole federal arbiter of such issues that the effectiveness of the federal judicial branch would be impaired. We see no compelling interest to justify this kind of radical tampering with the present judicial system and the form in which it has functioned for so many years. Indeed, given the lower federal courts' present-day role in that system, such tampering may now be unconstitutional, whatever Congress could have done in 1789.

2. *Other Constitutional Provisions*

Aside from the limitations inherent in Article III of the Constitution and the historic role of the judiciary in our system of government, other constitutional provisions and considerations should constrain Congress from enacting any of the pending bills. Whatever the scope of Congress' authority over federal court jurisdiction under Article III, Congress may not exercise that authority in a manner that contravenes any other provision of the Constitution. While Congress is acknowledged to have plenary power to regulate interstate commerce,[141] for example, no one would suggest that Congress constitutionally could use that power to prohibit interstate transport of political pamphlets in violation of First Amendment guarantees, or to seize property moving in interstate commerce without due process of law in disregard of the Fifth Amendment. Congress' exercise of its authority over federal court jurisdiction, like the exercise of all of its other powers, is "entirely subject to all of the other provisions of the Constitution that constrain government power."[142]

As the Supreme Court observed:

> "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."[143]

By the same token, Congress' authority over jurisdiction may not constitutionally be used to shield government actions from judicial constitutional review.[144]

(a) *The Due Process Clause*

The Fifth Amendment prohibits the Government from depriving any person of life, liberty, or property without due process of law. Judicial constitutional review of government actions is an essential element of due process. While Congress has never before put the issue to the test by impairing federal court jurisdiction to exercise such review, several cases have intimated that a law eliminating any opportunity for federal judicial review in any class of cases would violate the Due Process Clause.[145]

Hence, Congress' authority over federal court jurisdiction under Article III is limited by the requirements of the Fifth Amendment's Due Process Clause.[146] And due process requires that there be a judicial remedy for someone claiming to be aggrieved by a government's violation of the Constitution.[147]

Applying these due process principles, the Supreme Court disregarded a section of the Military Selective Service Act[148] that purported to prohibit any judicial review of selective service classifications except in a criminal prosecution for violation of the Act and upheld a registrant's right to bring an action to enjoin an unlawful classification practice.[149] And the Court of Appeals for the District of Columbia Circuit refused to give effect to a provision of the Federal Deposit Insurance Act[150] that purported to deprive the courts of jurisdiction to review certain administrative actions taken pursuant to it.[151] Other cases have carefully scrutinized jurisdiction-limiting statutes according to these due process principles.[152]

In light of these precedents, it is extremely doubtful that the bills withdrawing jurisdiction in draft and military classification cases would withstand constitutional scrutiny. The Due Process Clause would not tolerate subjecting a citizen to loss of liberty by being inducted into the military without an opportunity for some form of judicial review of the law ordering that loss of liberty.[153] It is equally doubtful that Congress could constitutionally require the federal courts to enforce federal legislation—for example, by trying individuals for the crime of refusing induction into the military—but deny those courts jurisdiction, as two of the pending bills would do, to consider a challenge to the law's constitutionality by a person against whom enforcement is sought.[154]

Another due process principle limiting Congress' power over judicial jurisdiction is the requirement that all persons receive equal treatment under the law.[155] Statutes that would eliminate jurisdiction to hear narrow categories of constitutional claims violate this principle by invidiously discriminating against those who assert the particular claims thus singled out.[156] All of the bills presently under consideration save one (H.R. 114) suffer this infirmity. They each single out narrow categories of constitutional claims for jurisdictional oblivion—those involving public prayer, abortion, school desegregation, and sex discrimination in the military.

Since closing off federal judicial redress to persons claiming violations of specific constitutional rights impinges upon fundamental liberties, such jurisdictional limitations should be subjected to strict scrutiny by the courts and can satisfy the equal protection component of the Due Process Clause only where they are "shown to be *necessary* to promote a *compelling* governmental interest."[157] Yet it is doubtful that these jurisdictional limitations would satisfy even the lower standard applicable where fundamental rights are not involved: a statutory classification must bear a reasonable relationship to a permissible governmental purpose.[158] No legitimate, let alone compelling, governmental interest is served by curtailing federal court jurisdiction to hear specified constitutional claims. No serious argument can be made that such jurisdictional limitations are intended to promote judicial efficiency or any similar interest legitimately within Congress' purview under Article III.[159] And a desire to alter some judicial interpretations of the Constitution with which a majority of the Congress may disagree is not a licit governmental purpose that will satisfy the constitutional standard.[160]

(b) *Specific Constitutional Rights*

Statutes that would eliminate federal court jurisdiction to hear specified constitutional claims, as proposed in the present bills, may well be held to be impermissible abridgements of the constitutional rights underlying the claims as to which jurisdiction is denied. For example, the bills that would eliminate any federal judicial remedy against governmental violations of the First

Amendment through school prayer programs would themselves be an abridgement of First Amendment rights.[161]

It is established that, where the purpose and effect of a law is to obstruct judicial protection of constitutional rights, the law is unconstitutional unless it is necessitated by compelling and legitimate governmental interests.[162] As shown above, no such showing of justification can be made for bills like those here considered. Indeed, the present bills appear to have no purpose other than limiting constitutional rights as those rights have been enforced by the courts.

In *Faulkner v. Clifford*,[163] a district court invalidated a statutory provision that purported to deprive all federal courts of jurisdiction to review selective service classifications except in criminal prosecutions of registrants for violation of the Military Selective Service Act.[164] There, a registrant was punitively classified I-A for returning his registration card as a protest against the draft. The registrant commenced a civil action to challenge the punitive classification, arguing that his First Amendment right to protest the draft had been infringed. The Government moved to dismiss for lack of jurisdiction based on the statutory prohibition against judicial review. The court held that denying the registrant a judicial forum for his constitutional claim impermissibly chilled his exercise of First Amendment rights, and ruled the jurisdictional limitation to be unconstitutional as so applied.[165]

(c) *Structural Provisions*

As discussed above (Part II), depriving the federal judiciary of jurisdiction to hear constitutional claims threatens the basic structure of our government and particularly the principle of separation of powers. As Chief Justice Burger wrote in 1976:

> "Long ago, this Court found the ordinary presumption of constitutionality inappropriate in measuring legislation directly impinging on the basic tripartite structure of our Government. . . .

> "Our role in reviewing legislation which touches on the fundamental structure of our Government is therefore akin to that which obtains when reviewing legislation touching on other fundamental constitutional guarantees. Because separation of powers is the base framework of our governmental system and the means by which all our liberties depend, [the statute in question] can be upheld only if it is necessary to secure some overriding governmental objective, and if there is no reasonable alternative which will trench less heavily on separation-of-powers principles."[166]

We have already discussed how jurisdictional limitations of the sort proposed would offend one important structural provision of the Constitution, the Supremacy Clause (Part IIB above). Such jurisdictional limitations, by seeking indirectly to alter authoritative judicial interpretations of the Constitution, may also be regarded as an impermissible attempt to circumvent the process of constitutional amendment.[167]

We do not take issue with those who point out that, ultimately, legislative supremacy is at the heart of our democratic system. But the established constitutional mechanism for resolving a profound and lasting disagreement between the judicial branch and Congress, as the elected will of the people, as to the meaning of a constitutional provision, is amendment of the Constitution, not tampering with the jurisdiction of the courts. Under Article V, an amendment to the Constitution can be proposed by two-thirds of both houses of Congress or the application of legislatures of two-thirds of the states, and such amendment becomes effective when ratified by three-fourths of the states. The process of amending the Constitution was not intended to be a simple matter, but rather one that required great deliberation. Much more was required than the simple majority vote necessary for ordinary legislation.

The proposed jurisdictional limitations also implicate another important structural provision of the Constitution, the one governing impeachment. As noted above, the Framers intended impeachment to be the *sole* check on the judiciary.[168] Impeachment was intended to be much harder to achieve than ordinary legislation. High crimes and misdemeanors must be proven, and a two-thirds vote by the Senate is required for conviction.[169]

Were Congress able to act by simple majority upon every disagreement with the judiciary's constitutional interpretations by divesting the courts of jurisdiction, both of these carefully constructed safeguards—constitutional amendment and impeachment—requiring supermajority action by Congress and the people would be wholly avoided. Such a result would impair the tripartite balance of power in our constitutional system and would be inconsistent with the intentions of the draftsmen of the Constitution.

CONCLUSION

For the reasons here discussed, the Committee concludes that legislation to divest the federal courts of jurisdiction to hear constitutional claims, such as proposed in the pending bills, is probably unconstitutional and certainly unwise. The basic constitutional plan of separation of powers, and judicial constitutional review as an essential part of this plan, have served the nation well for two centuries. The plan should not be tampered with because some Supreme Court constitutional decisions are perceived to be out of step with public favor or even wrong.

We believe that, when faced with proposals to divest the federal courts of jurisdiction or to undermine their independence, Congress should be guided by the example of self-restraint exhibited by the 75th Congress when it rejected President Roosevelt's court-packing proposal. As the Senate Judiciary Committee put it in 1937:

> "Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen even against the Government itself, create the vicious precedent which must necessarily undermine our system? . . .

"... Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.

"... Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American Judiciary from attack as long as this Government stands."[170]

August 1981

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APPENDIX

LIST OF PENDING BILLS TO LIMIT FEDERAL COURT JURISDICTION TO HEAR CONSTITIONAL CLAIMS

Bill No.	Sponsor	Subject
H.R. 72	Ashbrook	Prayer
H.R. 73	Ashbrook	Abortion
H.R. 114	Bennett	State Judgments
H.R. 311 §106	Hansen	Prayer

H.R. 326	Holt	Prayer
H.R. 340	Holt	School Desegegation
H.R. 408	Quillen	Prayer
H.R. 761	McDonald	School Desegregation
H.R. 865	P. Crane	Prayer
H.R. 867	P. Crane	Abortion
H.R. 869	P. Crane	School Desegregation
H.R. 900 §2	Hyde, *et. ano.*	Abortion
H.R. 989	McDonald	Prayer
H.R. 1079	Hinson	School Desegregation
H.R. 1180	Ashbrook	School Desegregation
H.R. 1335	Nichols	Prayer
H.R. 2047	Moore	School Desegregation
H.R. 2347	P. Crane	Prayer
H.R. 2365	Evans	Armed Forces
H.R. 2791	Evans	Armed Forces
H.R. 3225	Mazzoli, *et al.*	Abortion
S. 158 §2	Helms	Abortion
S. 481	Helms, *et ano.*	Prayer
S. 528	Johnson, *et al.*	School Desegregation
S. 583	Hatch	Abortion

FOOTNOTES

[1] 1 A. de Tocqueville, *Democracy in America* ch. VI, at 107 (Bradley ed. 1945).

[2] For example, bills in the 1950s to deprive the federal courts of jurisdiction to hear challenges to loyalty-oath requirements or subversive activities laws; bills to eliminate federal court jurisdiction over legislative apportionment cases in the wake of the landmark decision in Baker v. Carr, 369 U.S. 186 (1962); earlier proposals to divest the courts of jurisdiction over challenges to religious observances in public schools; and bills introduced in the 1950s and again in the early 1970s which, like some of the present bills, would have deprived the federal courts of jurisdiction to order busing as a means of remedying school segregation. For descriptions and discussions of prior proposals to limit federal court jurisdiction to hear constitutional claims, *see, e.g.*, Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585, 593 (1975); Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 498-99 (1974); Freund, *Storm Over the American Supreme Court*, 21 Modern L. Rev. 345 (1958); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 159 (1960); Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229, 230 (1973); Note, *Governance*, 13 Ga. L. Rev. 1513, 1522-25 (1979); Note, *The Nixon Busing Bills and Congressional Power*, 81 Yale L.J. 1542 (1972); Kaufman, *Congress v. The Court*, N.Y. Times, Sept. 20, 1981, § 6 (Magazine), at 44, 48, 54. *See also* Nagel, *Court-Curbing Periods in American History*, 18 Vanderbilt L. Rev. 925 (1965) (statistical analysis of bills to limit the courts' powers); Note, *Governance, supra* at 1517-18 (examples of legislation to limit courts' jurisdiction in other countries).

[3] U.S. Const. art. VI, cl. 2.

[4] 67 A.B.A.J. 1082 (1981). This action by the ABA's House of Delegates was supported by a well-reasoned report from its Special Committee on Coordination of Federal Judicial Improvements, which concludes:

> "The real issue, the only issue, is whether, as a matter of policy and of constitutional permissibility, this nation is going to adopt a device whereby each time a

> decision of the Supreme Court or a lower court offends a majority of both houses of Congress, the jurisdiction of the federal courts to hear that issue will be stripped away. We do not believe that is a system the Framers intended nor one that we should strive to institute."

Id.

[5] For example, Former Solicitor General Robert Bork, although critical of many modern Supreme Court decisions, argued that enactment of the present jurisdiction-stripping bills "would not be in keeping with the spirit of the Constitution nor would it be in keeping with its structure." 67 A.B.A.J. 1095 (1981). The Reagan Administration, so far as we are aware, has not yet taken an official position. A Justice Department spokesman has said that the Justice Department "will not be announcing" its position on the bills. *Id.*

[6] Kaufman, *supra* note 2, at 44. *See also* Kaufman, *See the Founding Fathers Stir: Tampering With the Courts' Power Would Invite Instability*, L.A. Times, Mar. 25, 1981, § 2, at 7.

[7] H.R. 72, 326, 408, 865, 989, 1335, and 2347, 97th Cong., 1st Sess. (1981).

[8] S. 481, 97th Cong., 1st Sess. (1981).

[9] *E.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[10] S. 450, 96th Cong., 1st Sess. §§ 11-13 (1979).

[11] It is doubtful that these bills would have the intended effect of removing school prayer cases from the federal courts, since they would divest the federal courts of jurisdiction only to hear cases involving "voluntary" prayer. Therefore, under the bills, federal courts would have to decide the threshold question of whether a particular religious observance is "voluntary." One of the underpinnings of the Supreme Court's decisions on school prayer is that, particularly in dealing with impressionable schoolchildren, there is an element of subtle coercion in any religious observance led by a school authority and participated in by the majority of pupils, and participation in such an observance is therefore not entirely voluntary. Engel v. Vitale, 370 U.S. 421, 430-31 (1962); *see* Abington School Dist. v. Schempp, 374 U.S. 203, 228, 288-93 (1963) (concurring opinion). (However, the Court has held squarely that even absent coercion, government sponsorship of prayer in public schools violates the Establishment Clause of the First Amendment. Engel v. Vitale, *supra* at 430.) Furthermore, questions of fact that affect constitutional rights are exclusively within the province of the federal judiciary, and ultimately the Supreme Court, to decide. *E.g.*, Crowell v. Benson, 285 U.S. 22, 60 (1932) (Hughes, C.J.):

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

See id. at 58-61. *See also* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872).

[12] U.S. Const. art. VI, cl. 2.

[13] H.R. 311, 97th Cong., 1st Sess. § 106 (1981).

[14] Harris v. McRae, 100 S. Ct. 2671 (1980); Belotti v. Baird, 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

[15] Specifically, H.R. 73 and S. 583 would forbid the issuance by any federal court other than the Supreme Court of "any restraining order or temporary or permanent injunction" in cases involving "any Federal or State law" that "prohibits, limits, or regulates abortion," abortion clinics, or persons that provide abortions, and in cases involving any federal or state law that "prohibits, limits, or regulates the provision at

public expense of funds, facilities, personnel, or other assistance for the performance of abortions." H.R. 73, 97th Cong., 1st Sess. (1981); S. 583, 97th Cong. 1st Sess. (1981).

[16] H.R. 90, H.R. 3225, S. 158, 97th Cong., 1st Sess. (1981).

[17] The availability and timing of traditional judicial remedies may have consequences for the realization of substantive constitutional rights. *See, e.g.*, Oestereich v. Selective Service Bd., 393 U.S. 233 (1968) (pre-induction judicial review of Selective Service classifications); Freedman v. Maryland, 380 U.S. 51 (1965) (motion picture censorship).

[18] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26-31 (1971) (Burger, C.J.); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (Burger, C.J.); *see* Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2.

[19] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30-31 (1971).

[20] Thus, H.R. 340, 97th Cong., 1st Sess. (1981), provides that no federal court shall have jurisdiction to render a decision "the effect of which would be to require that pupils be assigned to a particular school on the basis of their race, color, religion, or national origin." H.R. 761, 97th Cong., 1st Sess. (1981), provides that no federal court shall have jurisdiction to render a decision "which would have the effect of requiring any individual to attend any particular school." Two identical bills, H.R. 1079 and H.R. 1180, 97th Cong., 1st Sess. (1981), provide that "no court of the United States shall have jurisdiction to require the attendance at a particular school of any student because of race, color, creed, or sex."

[21] At the time H.R. 2365 was introduced, a three-judge federal district court had ruled that exempting women from the application of the Military Selective Service Act, 50 U.S.C. App. §§ 451 *et seq.*, invidiously discriminated against males and therefore violated the equal protection component of the Fifth Amendment's Due Process Clause. The Supreme Court subsequently reversed this decision on appeal and upheld the constitutionality of a draft law that applies only to males. *See* Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa. 1980), *enforcement stayed*, 101 S. Ct. 1 (1980), *rev'd*, 101 S.Ct. 2646 (1981). *See generally* Committee on Federal Legislation, *If the Draft Is Resumed: Issues for a New Selective Service Law*, 36 Rec. A.B. City N.Y. 98, 105-10 (1981).

[22] *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976); Owens v. Brown, 455 F. Supp. 291 (D.C. 1978).

[23] Redish & Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 49-50, 81-92 (1975), which analyzes a line of authorities primarily based upon Tarble's Case, 80 U.S. (13 Wall.) 397 (1871). However, in contrast, Professor Hart suggests that "in the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones." He notes that Congress cannot limit the state courts' jurisdiction to hear claims under the Federal Constitution. "The state courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution." Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1401 (1953).

[24] *The Federalist No. 47*, at 301 (New Am. Lib. ed. 1961).

[25] *Id. No. 48*, at 308.

[26] *E.g.*, Buckley v. Valeo, 424 U.S. 1, 120-24 (1976).

[27] U.S. Const. art. III, § 1; *see* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22-23 (1955); O'Donoghue v. United States, 289 U.S. 516, 529-31 (1933); Evans v. Gore, 253 U.S. 245, 249-50 (1920); Redish & Woods, *supra* note 23, at 78-79 & n.157 (1975).

[28] Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U.L. Rev. 1, 5 & n.3, 8-10, 29 (1951) (citing historical authorities); Kaufman, *supra* note 2, at 56. For example, Hamilton explained:

> "The inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. . . .
>
> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."

The Federalist Nos. 78-79, *supra* note 24, at 470-72. *See also* text accompanying note 69 *infra* (quoting Madison).

[29] 5 U.S. (1 Cranch) 137 (1803).

[30] *Id.* at 177.

[31] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[32] *The Federalist No. 81*, *supra* note 24, at 483.

[33] Thus, Hamilton emphasized:

> "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

Id. No. 78, at 466.

[34] *Id.* at 468.

[35] *Id.* at 465.

[36] *Id.*

[37] *See generally* Committee on Federal Legislation, *Citizens' Standing To Sue in Federal Courts*, 34 Rec. A.B. City N.Y. 585 (1979).

[38] *See generally* 1 A. de Tocqueville, *supra* note 1, at 103, 106-07. Also note that the Court's doctrine of "constitutional avoidance"—by which it refrains from deciding constitutional questions where possible—is based in part upon "the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely." Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 72 (1961); *see also* Ashwander v. TVA, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring).

[39] U.S. Const. art. III, § 2. As the Supreme Court explained in Flast v. Cohen, 392 U.S. 83, 95 (1968):

> "In part those words ["cases" and "controversies"] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine."

The Court noted, for example, that no justiciable controversy is presented when parties seek an advisory opinion, and that the longstanding rule against such opinions implemented the separation of powers described by the Constitution and served to confine the judiciary to its proper role. *Id.* at 95.

[40] *The Federalist No. 78*, *supra* note 24, at 468-69.

[41] *Id. No. 79*, at 474.

[42] *Id. No. 81*, at 484.

[43] *Id.* at 485.

[44] *See, e.g., id. No. 78*, at 466; Redish & Woods, *supra* note 23; Tweed, *supra* note 28. State courts might not have power to prevent unconstitutional actions by the federal government. *See* Redish & Woods, *supra* note 23, at 49-50, 81-92.

[45] R. Berger, *Congress v. The Supreme Court* 337 (1969).

[46] U.S. Const. art. VI, cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[47] *See* Ratner, *supra* note 2, at 160-61, 165 & n.41, 166-67, 184-85.

[48] *See, e.g., id.*; Eisenberg, *supra* note 2, at 505-07; Sedler, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. Pitt. L. Rev. 99, 113-14 (1958).

[49] C. Black, *Structure and Relationship in Constitutional Law* 74-76 (1969).

[50] O.W. Holmes, *Collected Legal Papers* 295 (1920).

[51] *The Federalist No. 22*, *supra* note 24, at 150:

> "A circumstance which crowns the defects of the Confederation remains . . . the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation."

[52] *Id. No. 80*, at 476.

[53] *Id. No. 22*, at 150.

[54] I. M. Farrand, *Records of the Constitutional Convention* 124 (1911) (emphasis added). At the Constitutional Convention, the principal debate over Article III was whether to create federal courts of general original jurisdiction, or whether the state courts should try all federal causes in the first instance with a right of appeal to the Supreme Court on federal questions; both sides acknowledged the necessity of Supreme Court appellate jurisdiction to review state court decisions on federal issues. Ratner, *supra* note 2, at 161-65 & nn.15-25 (citing the debates); Eisenberg, *supra* note 2, at 505, 508-10. This debate continued in the First Congress after the Constitution was ratified. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 53, 65-68, 123-25 (1923).

[55] Ch. 20, § 25, 1 Stat. 85.

[56] 28 U.S.C. § 1257 (1976).

[57] Ratner, *supra* note 2, at 184-85.

[58] Warren, *supra* note 54, at 65 & n.39.

[59] *Id.* at 67-68.

[60] Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888); *see, e.g.*, Ames v. Kansas, 111 U.S. 449, 463-64 (1883); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378-412 (1821).

[61] Ratner, *supra* note 2, at 166; *see id.* at 166-67 & n.49.

[62] 14 U.S. (1 Wheat.) 304 (1816).

[63] *Id.* at 347-48. In previous proceedings in the case, the Supreme Court had re-

versed a decision of the Virginia Court of Appeals and remanded the cause with instructions to enter judgment for the appellant. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). The Virginia court refused to obey the mandate, holding that the Supreme Court's appellate jurisdiction could not constitutionally extend to decisions by the courts of a sovereign state, but only to such inferior federal courts as Congress might establish under Article III. Hunter v. Martin, 18 Va. (4 Munf.) 1 (1814).

[64] 19 U.S. (6 Wheat.) 264 (1821).

[65] *Id.* at 416-18. *See also* Dodge v. Woolsey, 59 U.S. (18 How.) 331, 350-51, 355 (1855), in which the Supreme Court opined:

> "[T]he framers of the constitution, and the convention which ratified it, were fully aware of the necessity for . . . a department . . . to which was to be confided the final decision judicially of the powers of that instrument, the conformity of laws with it, which either congress or the legislatures of the States may enact, and to review the judgments of the State courts, in which a right is decided against, which has been claimed in virtue of the constitution . . . .
>
> "Without the supreme court, as it has been constitutionally and legislatively constituted, neither the constitution nor the laws of congress passed in pursuance of it . . . would be in practice or in fact the supreme law of the land . . . ."

[66] 62 U.S. (21 How.) 506 (1858).

[67] *Id.* at 517-18. Likewise, in Gordon v. United States, 117 U.S. 697, 700-01 (1858), the Supreme Court opined that

> "there was . . . an absolute necessity . . . that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers . . . . The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured."

[68] 319 U.S. 624, 638 (1943)

[69] 5 *The Writings of James Madison* 269 (Hunt ed. 1904), *quoted in* J. Choper, *Judicial Review and the National Political Process* 60-61 (1980).

[70] *See, e.g., The Federalist No. 79, supra* note 24; J. Choper, *supra* note 69, at 67-70; United States v. Will, 101 S. Ct. 471, 482-83 (1980).

[71] *See, e.g.,* note 33 *supra* and accompanying text (quoting Hamilton); J.Choper, *supra* note 69, at 60-128, 167-68; Eisenberg, *supra* note 2, at 506-07; Redish & Woods, *supra* note 23, at 76-79; Tweed, *supra* note 28, at 5; Warren, *supra* note 54, at 115 (quoting Madison).

[72] C. Hughes, *The Supreme Court of the United States* 236 (1927).

[73] F. Frankfurter, *Law and Politics* 52 (1939).

[74] Chambers v. Florida, 309 U.S. 227, 241 (1940), *quoted in* Kaufman, *supra* note 6, at 7.

[75] *E.g.,* Youngstown Co. v. Sawyer, 343 U.S. 579 (1952); Lynch v. United States, 292 U.S. 571 (1934); *see* Fink, *Undoing the High Court,* N.Y. Times, July 17, 1981, at A23.

[76] Representative Barney Frank (D.-Mass.) made a similar point while speaking at the American Bar Association convention in August 1981. *See* Taylor, *The Bar Weighs in as a Friend of the Courts,* N.Y. Times, Aug. 16, 1981, § 4, at 7.

[77] Freund, *supra* note 2, at 350; *see* Gompers v. United States, 233 U.S. 604, 610

(1914) (Holmes, J.).

[78] *See* Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1006 (1965).

[79] Committee on Federal Legislation, *Federal Diversity Jurisdiction*, 33 Rec. A.B. City N.Y. 493, 500 (1978).

[80] The provision that the judicial power of the United States "shall be vested" in the Supreme Court and in such inferior federal courts as Congress may establish (art. III, § 1) would seem on its face to require that the entire judicial power (defined in art. III, § 2) be conferred upon the federal judiciary. Indeed, one early Supreme Court decision by Justice Story so opined. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-31 (1816) (Story, J.) (dicta). *See generally* Eisenberg, *supra* note 2, at 501-02 & nn.23-27. However, the Supreme Court later rejected this view. *E.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850).

[81] 28 U.S.C. § 1332 (1976).

[82] 28 U.S.C. § 1257 (1976).

[83] *Hart, supra* note 23, at 1365; Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53, 53-54 (1962); Ratner, *supra* note 2, at 183-84.

[84] Hart, *supra* note 23, at 1362-63 & *passim* (Professor Hart concludes that these dicta cannot be taken at face value); *cf.* Warren, *supra* note 54, at 51.

[85] *See* Brest, *supra* note 2, at 594; Eisenberg, *supra* note 2, at 517-20; Hart, *supra* note 23, at 1365, 1371-74.

[86] *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Van Alstyne, *supra* note 2, at 267-68; Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2, at 1547, 1556-57.

[87] *See* notes 40-43 *supra* and accompanying text.

[88] *See* Eisenberg, *supra* note 2, at 514-18. An attempt to define the legitimate scope of Congress' regulation of federal court jurisdiction in all cases is beyond the scope of this Report, which is concerned solely with Congress' authority to limit the courts' jurisdiction to hear constitutional claims. Congress' power to limit jurisdiction to hear claims that arise solely under congressional statute, and do not implicate constitutional rights, is probably much broader; indeed, denial of a judicial remedy to enforce rights that are claimed solely under a federal statute might be seen as a limitation of the substantive rights created by the statute. *Cf.* Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 42 (1918):

> "[F]or legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it."

[89] Youngstown Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

[90] U.S. Const. art. III, § 2.

[91] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[92] Ratner, *supra* note 2, at 172-73 (citing authorities). Professor Ratner states:

> "The defeat of the amendment thus may reasonably be construed as a rejection by the Convention of plenary congressional control over the appellate jurisdiction of the Court and as indicating that the purpose of the clause was to authorize exceptions and regulations by Congress not incompatible with the essential constitutional functions of the Court."

Id. at 173.

[93] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[94] Youngstown Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring), quoted in text accompanying note 89 *supra*; *Legal Tender Case*, 110 U.S. 421, 439

(1884); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[95] *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 20 (2d ed. 1973) (footnotes omitted):

> "The important provision that the appellate jurisdiction should be subject to exceptions and regulations by Congress was contained in none of the plans [submitted to the Constitutional Convention]. It is foreshadowed in Randolph's draft for the Committee on Detail and then appears in a letter draft in Wilson's handwriting in substantially the form in which the Committee reported it. There was no discussion in the Committee."

[96] R. Berger, *supra* note 45, at 285-96; Merry, *supra* note 83, at 57-68; Warren, *supra* note 54, at 56, 61, 74-75, 78-79, 90, 94, 96-104, 112-115, 127. Article III, Section 2, grants the Supreme Court appellate jurisdiction in all cases within the federal judicial power "both as to Law and Fact"; this sentence continues with the Exceptions Clause.

[97] *The Federalist No. 81*, *supra* note 24, at 488. The issue was hotly debated because there were such varying practices in the states respecting review of trial court and jury factual determinations. R. Berger, *supra* note 45, at 286-89.

[98] R. Berger, *supra* note 45, at 289. The First Congress addressed this question in enacting the Judiciary Act of 1789. Warren, *supra* note 96. It also resolved the scope of review of jury findings in proposing the Seventh Amendment:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

[99] Hart, *supra* note 23, at 1364.

[100] *Id.* at 1365; *accord*, R. Berger, *supra* note 45, at 296; Brest, *supra* note 2, at 594; Merry, *supra* note 83, at 53-54, 56-67; Ratner, *supra* note 2, at 171-72. *Contra*, Van Alstyne, *supra* note 2, at 260; Wechsler, *supra* note 78, at 1005-06.

[101] Ratner, *supra* note 2, at 168-71.

[102] *See* authorities cited in note 83 *supra*.

[103] Colorado Central Mining Co. v. Turck, 150 U.S. 138, 141 (1893); American Constr. Co. v. Jacksonville Ry., 148 U.S. 372, 378 (1893); The Francis Wright, 105 U.S. 381, 385-86 (1881); United States v. Young, 94 U.S. 258, 259 (1876); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865); Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847); Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799); Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796).

[104] For an excellent analysis of the cases, *see* Ratner, *supra* note 2, at 173-83.

[105] 74 U.S. (7 Wall.) 506 (1869).

[106] 80 U.S. (13 Wall.) 128 (1872).

[107] For a thorough discussion of the case and its background, *see* Van Alstyne, *supra* note 2, *passim*.

[108] Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

[109] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

[110] Van Alstyne, *supra* note 2, at 233-35.

[111] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318 (1868).

[112] Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44; *see* Van Alstyne, *supra* note 2, at 238-41.

[113] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869).

[114] Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2, at 1555; *cf.* Van Alstyne, *supra* note 2, at 239-40, 248 & n.72.

[115] Glidden Co. v. Zdanok, 370 U.S. 530. 605 & n.11 (1962) (Douglas, J., dissenting).

[116] *See* Hart, *supra* note 23, at 1364-65.

[117] Van Alstyne, *supra* note 2, at 249-54; *see Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 105 (1869).

[118] 74 U.S. (7 Wall.) at 515 (citation omitted; emphasis added). The "previously exercised" jurisdiction referred to was the Supreme Court's power to review by writ of certiorari habeas corpus cases commenced in the lower courts, and to issue original writs of habeas corpus in such cases, under the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81 (1789).

[119] 75 U.S. (8 Wall.) 85 (1869).

[120] *Id.* at 105-06; *see* Van Alstyne, *supra* note 2, at 252.

[121] 75 U.S. (8 Wall.) at 96-103; *see* Ratner, *supra* note 2, at 179.

[122] 80 U.S. (13 Wall.) 128 (1872).

[123] *Id.* at 146.

[124] *Id.* at 146-47.

[125] U.S. Const. art. III, § 1.

[126] Martin v Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330-31 (1816) (Story, J.) (dicta).

[127] *See also* J. Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 246 (1971).

[128] *See* note 80 *supra* and accompanying text.

[129] *See* Eisenberg, *supra* note 2, at 502-04; Redish & Woods, *supra* note 23, at 56-61.

[130] *See, e.g.*, Eisenberg, *supra* note 2, at 500-04; Ratner, *supra* note 2, at 158; Redish & Woods, *supra* note 23, at 46-47.

[131] Eisenberg, *supra* note 2, *passim*.

[132] Redish & Woods, *supra* note 23, *passim*.

[133] 407 U.S. 225 (1972).

[134] *Id.* at 239.

[135] *Id.* at 242.

[136] American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 166 (1969).

[137] U.S. Const. art. III, § 1; see text accompanying notes 27-28, 33, 70 *supra*.

[138] C. McGowan, *The Organization of Judicial Power in the United States* 16 (1967).

[139] *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971) (reviewing school desgregation remedies):

> "This Court, in [Brown v. Board of Educ., 347 U.S. 483 (1954)], appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of 'trial and error,' and our effort to formulate guidelines must take into account their experience."

See also Mapp v. Ohio, 367 U.S. 643, 651-53 (1961) (applying the federal exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914), to state criminal trials).

[140] Craven, *Integrating the Desegregation Vocabulary — Brown Rides North, Maybe*, 73 W. Va. L. Rev. 1, 3 (1970) (footnotes omitted).

[141] U.S. Const. art. I, § 8, cl. 3; *see, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-97 (1824); Katzenbach v. McClung, 379 U.S. 294, 303-05 (1964).

[142] Hart, *supra* note 23, at 1371-72; Van Alstyne, *supra* note 2, at 263-64; *see* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936); Feinberg v. FDIC, 522 F.2d 1335, 1342 (D.C. Cir. 1975); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); Faulkner v. Clifford, 289 F. Supp.

895, 898-901 (E.D.N.Y. 1968), *appeal dismissed*, 393 U.S. 1046 (1969).

[143] Williams v. Rhodes, 393 U.S. 23, 29 (1968).

[144] Feinberg v. FDIC, 522 F.2d 1335, 1341-42 (D.C. Cir. 1975); International Tel. & Tel. Corp. v. Alexander, 396 F. Supp. 1150, 1163-64 & n.31 (D. Del. 1975); *cf.* Cortright v. Resor, 325 F. Supp. 797, 808-10 (E.D.N.Y. 1971); Hart, *supra* note 23, at 1387.

[145] Oestereich v. Selective Service Bd., 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring) (citations omitted):

> "It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims."

See Bob Jones University v. Simon, 416 U.S. 725, 746 (1974); Yakus v. United States, 321 U.S. 414, 434, 441-44 (1944); Crowell v. Benson, 285 U.S. 22, 58-61 (1932); Feinberg v. FDIC, 522 F.2d 1335, 1337-42 (D.C. Cir. 1975); International Tel. & Tel. Corp. v. Alexander, 396 F. Supp. 1150, 1168 (D. Del. 1975); Faulkner v. Clifford, 289 F. Supp. 895, 898-901 (E.D.N.Y. 1968), *appeal dismissed*, 393 U.S. 1046 (1969).

[146] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936); Feinberg v. FDIC, 522 F.2d 1335, 1342 (D.C. Cir. 1975); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[147] *See* Bell v. Hood, 327 U.S. 678, 684 (1946); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803); *cf.* Cortright v. Resor, 325 F. Supp. 797, 809-10 (E.D.N.Y. 1971).

[148] 50 U.S.C. App. §460(b)(3)(1964).

[149] Oestereich v. Selective Service Bd., 393 U.S. 233 (1968).

[150] 12 U.S.C. §1818(i)(1964).

[151] Feinberg v. FDIC, 522 F.2d 1335 (D.C. Cir. 1975).

[152] *See* cases cited notes 144-46 *supra*.

[153] Oestereich v. Selective Service Bd., 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring); *see also* Yakus v. United States, 321 U.S. 414, 434, 441-44 (1944).

[154] Hart, *supra* note 23, at 1371-83; Wechsler, *supra* note 78, at 1006; *compare* Lockerty v. Phillips, 319 U.S. 182 (1943), *with* Yakus v. United States, 321 U.S. 414 (1944).

[155] Standards developed under the Fourteenth Amendment Equal Protection Clause are applicable to the federal government under the Fifth Amendment Due Process Clause. *E.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[156] Van Alstyne, *supra* note 2, at 263-64; *cf.* Eisenberg, *supra* note 2, at 516; Sedler, *supra* note 48.

[157] Dunn v. Blumstein, 405 U.S. 330, 339 (1972) (first emphasis added); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (first emphasis added).

Most of the bills under consideration here would be subject to strict scrutiny under the "compelling governmental interest" test. The bills relating to public prayer (Part IA above) implicate the religious freedoms guaranteed by the First Amendment and would therefore be subject to such scrutiny. *See* Sherbert v. Verner, 374 U.S. 398, 403-06 (1963). Regarding the abortion bills (Part IB above), the Supreme Court has held that a woman's right to an abortion in the first trimester of pregnancy is a fundamental constitutional right that may be limited only where necessary to promote a compelling governmental interest. Roe v. Wade, 410 U.S. 113, 154-55 (1973). The bills relating to school desegregation (Part IC above) would abridge remedies for segregation in the public schools based on race, a constitutionally suspect classification that calls into play strict scrutiny under the compelling governmental interest test. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-93 (1964); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). *But cf.* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265-66 (1977) (facially neutral classification having racially discriminatory impact will be subject to strict scrutiny only if motivated by racial discrimination). Strict scrutiny under the compelling governmental interest test has also been applied to classifications affecting other fundamental rights. *E.g.*, Police Dep't v. Mosley, 408 U.S. 92, 97-99 (1972) (freedom of speech); Dunn v. Blumstein, 405 U.S. 330, 338-39 (1972) (right to travel); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 670 (1966) (right to vote); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate).

Sex-based classification, the subject of the pending armed forces bills (Part ID above), is reviewed under a different test: whether the classification is substantially related to an important government interest. *E.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[158] *E.g.*, McDonald v. Board of Election, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Railway Express v. New York, 336 U.S. 106, 109-10 (1949).

[159] Eisenberg, *supra* note 2, at 514-17; Van Alstyne, *supra* note 2, at 263-64. *See generally* text accompanying note 88 *supra*.

[160] Eisenberg, *supra* note 2, at 517-20; Hart, *supra* note 23, at 1371; Van Alstyne, *supra* note 2, at 267-68; Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2, at 1547; *see* United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1872) (impermissible for Congress to withhold jurisdiction "as a means to an end").

[161] *See* Hart, *supra* note 23, at 1371-72; *cf.* Cortright v. Resor, 325 F. Supp. 797, 808-10 (E.D.N.Y. 1971).

[162] *Compare* Boddie v. Connecticut, 401 U.S. 371, 376-78 (1971) (Due Process Clause does not permit denying persons access to judicial remedies that affect fundamental rights), *with* Shapiro v. Thompson, 394 U.S. 618, 631, 634 (1969) (Equal Protection Clause does not permit classification that has purpose and effect of impairing fundamental rights). *See also* United States v. Kras, 409 U.S. 434, 446-47 (1973).

[163] 289 F. Supp. 895 (E.D.N.Y. 1968), *appeal dismissed,* 393 U.S. 1046 (1969).

[164] 50 U.S.C. App. § 460(b)(3)(1964).

[165] 289 F. Supp. at 900-01.

[166] Nixon v. Administrator of General Services, 433 U.S. 425, 506 (1977) (Burger, C.J., dissenting).

[167] Kaufman, *supra* note 2, at 56, 96.

[168] *See* notes 40-43 *supra* and accompanying text.

[169] U.S. Const. art. I, § 3; *id.* art. II, § 4. *See generally* Committee on Federal Legislation, *Precis of Report on the Removal of Federal Judges Other Than by Impeachment*, 32 Rec. A.B. City N.Y. 239 (1977); *see also*, Kaufman, *Chilling Judicial Independence*, 34 Rec. A.B. City N.Y. 157 (1979).

[170] S. Rep. No. 711, 75th Cong., 1st Sess. 13-14 (1937).

In the

United States Court of Appeals

For the Third Circuit

Nos. 81-1692, 81-1695, 81-1790

DOROTHY HOOTS, et al.,
Appellees,

vs.

COMMONWEALTH OF PENNSYLVANIA, et al., and CHURCHILL AREA SCHOOL DISTRICT, EDGEWOOD SCHOOL DISTRICT, SWISSVALE AREA SCHOOL DISTRICT, TURTLE CREEK AREA SCHOOL DISTRICT, School District of Churchill Area,
Appellant.

Appeals from Orders of the United States District Court for the Western District of Pennsylvania. (D. C. Civil No. 71-0538)

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In the

United States Court of Appeals

For the Third Circuit

Nos. 81-1692, 81-1695, 81-1790

DOROTHY HOOTS, et al., *Appellees,* *vs.* COMMONWEALTH OF PENNSYLVANIA, et al., and CHURCHILL AREA SCHOOL DISTRICT, EDGEWOOD SCHOOL DISTRICT, SWISSVALE AREA SCHOOL DISTRICT, TURTLE CREEK AREA SCHOOL DISTRICT, School District of Churchill Area, *Appellant.*	Appeals from Orders of the United States District Court for the Western District of Pennsylvania. (D. C. Civil No. 71-0538)

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal pursuant to 28 U. S. C. § 1291 by the Churchill Area School District from a final judgment of the District Court. The case involves multiple parties but the final judgment applies to all parties.

STATEMENT OF ISSUES

I. Is there any basis for finding a constitutional violation upon which the trial court could properly predicate its order dissolving five independent school districts and merging them into a single district?

A. Is it a violation for a state to maintain adjacent school districts which have disparate proportions of minority students?

B. In the absence of a racially discriminatory intent or purpose, is it a violation to draw or redraw school district lines so that adjacent school districts have disparate numbers of minority students?

C. Is there any evidence of racially discriminatory intent or purpose?

D. Does ignoring race when establishing school district lines constitute establishment of an improper racial classification?

II. As to the Churchill Area School District, does the scope of the remedy exceed the nature and extent of the alleged violation?

A. Was Churchill the perpetrator of, the product of, or affected by any constitutional violation?

B. May Churchill be included in a remedy when it was not available for consolidation with the Plaintiffs' school district at the time that district was established?

III. Was Churchill a necessary party and required Defendant for the violation as well as the remedial phase of the case?

STATEMENT OF THE CASE

Nature of the Case, Parties, Course of Proceedings and Disposition in the Court Below

This suit, filed in 1971, pertains to alleged discrimination in the consolidation of formerly separate municipal school districts, none of which maintained a dual school system at any time before or since 1971. The school districts involved in the litigation are located in east central Allegheny County, that part of Allegheny County east of the City of Pittsburgh and north of the Monogahela River. Neither the municipalities, nor the county, nor the state has any history of *de jure* school segregation.

Plaintiffs-Appellees are black children and their parents residing in the General Braddock School District ("General Braddock"), Administrative Unit No. 16, in Allegheny County. General Braddock was formed by the merger, effective in 1971, of three smaller municipal school districts, Braddock, North Braddock and Rankin, none of which maintained a dual school system prior to the merger. Merger was pursuant to a Pennsylvania statute, the Act of July 8, 1968, P. L. 299, No. 150, 24 P. S. § 2400.1 *et seq.* ("Act 150").

The Amended Complaint alleges that, pursuant to Act 150, state and county school officials prepared and approved plans for the reorganization of school districts in a manner which violated the Fourteenth Amendment. As a first cause of action Plaintiffs allege that by preparing and approving the plans for General Braddock's organization, state and county officials encouraged and compelled the formation of a racially identifiable school district. As a second cause of action, Plaintiffs allege that, by establishing General Braddock, state and county officials formed a district which does not have the economic capacity nor educational resources to provide an educational program commensurate with those of adjoining school districts. (20a-41a)

The original Defendants were the Commonwealth of Pennsylvania ("Commonwealth"), the Pennsylvania State Board of Education ("State Board") and the Allegheny Intermediate Unit Board of School Directors, successor to the Allegheny County Board of School Directors ("County Board"). The Chairman and President, respectively, of the State and County Boards were also original Defendants.

The Amended Complaint referred specifically to five school districts, but none of those districts was made a Defendant. The five districts are:

General Braddock, Plaintiffs' school district, consisting of the former municipal school districts of Braddock, North Braddock and Rankin.

Churchill Area School District ("Churchill"), Administrative Unit No. 15, consisting of the former Churchill Union district, a district in turn composed of the former municipal school districts of Forest Hills, Chalfant and Wilkins-Churchill;

Turtle Creek School District ("Turtle Creek"), Administrative Unit No. 42, consisting of the former municipal school districts of Turtle Creek and East Pittsburgh;

Swissvale Area School District ("Swissvale"), Administrative Unit No. 38, consisting of the former municipal school districts of Swissvale and Braddock Hills; and

Edgewood School District ("Edgewood"), Administrative Unit No. 40, consisting of the former Edgewood municipal school district.

The State and County Boards moved to dismiss for failure of the Plaintiffs to join these school districts as necessary parties. (946a-947a) When the Court denied the motion, the state invited the school districts to intervene, but none did so. (614a-618a) The named Defendants then answered the Amended Complaint and admitted, *inter alia,* that General Braddock, Churchill, Turtle Creek, Swissvale and Edgewood were formed pursuant to Act 150. (42a-43a) As to Churchill this admission was incorrect; the parties subsequently stipulated and the District Court found that Churchill was established under a prior statute. (P. Ex. 61, Para. 15, 700a), *Hoots* v. *Commonwealth,* 359 F. Supp. 807, 813 (W.D. Pa. 1973).

The issue of violation was tried in December, 1972. On May 15, 1973 the District Court ruled that the Plaintiffs had proved a case of racial discrimination by the parties defendant, and ordered the State and County Boards to submit plans to remedy the situation. *Hoots* v. *Commonwealth, supra.* Although the May 15, 1973 decision was not subject to appellate review, see *Hoots* v. *Commonwealth,* 587 F. 2d 1340, 1351 (3d Cir. 1978), Churchill and Turtle Creek sought leave to intervene for the purpose of challenging it. The District Court denied this request, and the Churchill-Turtle Creek appeal was dismissed. *Hoots* v. *Commonwealth,* 495 F. 2d 1095 (3d Cir. 1974).

In October 1973 the District Court had offered Churchill and other districts adjacent to General Braddock leave to intervene for the limited purpose of the remedial hearings. (988a) Eventually, in May 1979, the Court ordered that nine school districts, including Churchill, be made parties on the issue of remedy. (853a) The school districts which the Court made parties for the remedial phase of the case were the five districts listed above plus four additional districts:

Gateway Area School District ("Gateway"), Administrative Unit No. 14, consisting of the former Gateway Union district, a district in turn composed of the former municipal school districts of Monroeville and Pitcairn;

East Allegheny School District ("East Allegheny"), Administrative Unit No. 18, consisting of Wilmerding Township and the former North Versailles Merged district, a district in turn composed of the former municipal school districts of East McKeesport, Wall, North Versailles and Wilmerding;

West Mifflin School District ("West Mifflin"), Administrative Unit No. 20, consisting of West Mifflin Union, a district in turn composed of the former municipal school districts of West Mifflin and Whitaker; and

Steel Valley School District ("Steel Valley"), Administrative Unit. 21, consisting of the former municipal school districts of West Homestead, Homestead and Munhall.

A tenth school district participated in the remedial phase of the case although it was not made a party, that district being Wilkinsburg School District ("Wilkinsburg"), Administrative Unit No. 17, consisting of the former Wilkinsburg municipal school district.

The District Court held numerous hearings on remedy over an extended period of time. On four occasions during the remedial phase of the case Plaintiffs sought relief in this Court. Their appeal from an order denying approval of a remedial plan was dismissed for lack of appellate jurisdiction in *Hoots* v. *Commonwealth,* 587 F. 2d. 1340 (3d Cir. 1978). Two applications for writs of mandamus were also denied. *Hoots* v. *Weber,* No. 79-1474 (3d Cir. May 2, 1979); *Hoots* v. *Weber,* No. 80-2124 (3d Cir. September 9, 1980). Finally, in an appeal asserting denial of injunctive relief as the basis of appellate jurisdiction, this Court ordered the District Court to decide the *Milliken* issues and determine a remedy within 90 days, the remedy to be effective for the 1981-1982 school year. *Hoots* v. *Commonwealth,* 639 F. 2d 972 (3d Cir. 1981).

The trial court ruled on March 5, 1981 that districts close to Braddock, including Churchill, could be included in the remedy even though the districts themselves had not committed any constitutional violations. Churchill, Turtle Creek, Swissvale, East Allegheny, Edgewood and Gateway were identified as districts which, besides General Braddock, could be included in the remedy. The Court dismissed West Mifflin and Steel Valley. *Hoots* v. *Commonwealth,* 510 F. Supp. 615 (W.D. Pa. 1981)

On April 28, 1981 the District Court ordered that Churchill, Turtle Creek, Swissvale, Edgewood and General Braddock be dissolved and merged into a single New District. East Allegheny and Gateway were dismissed as Defendants. (Opinion and Order of April 28, 1981, 883a-901a)

Churchill, Turtle Creek, Swissvale, Edgewood, the Commonwealth, the State Board and Deming Lewis, its Chairman, and the County Board and Ed Hallenberg, its President, have appealed.

Statement Of Facts

Pennsylvania Law Regarding Consolidation of School Districts

Prior to Act 561

Article 3, Section 14, of the Pennsylvania Constitution gives the General Assembly the power to provide for the maintenance and support of a public school system. The Public School Code of 1949 provided, as Pennsylvania has provided since at least 1911, that each municipality in the Commonwealth would constitute a separate school district. (24 P.S. § 2-201) The Code of 1949 also permitted, but did not require, the consolidation of municipal school districts. Consolidation could occur through "jointure", *i.e.* by agreement of boards of directors (24 P.S. § 17-1701, *et seq.*), or "union", *i.e.* by referenda (24 P.S. § 2-251, *et seq.*). In either case, final approval was required from the county and the state.

Act 561

In 1961, the Legislature amended the Public School Code by the Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. § 2-281, *et seq.* ("Act 561"). This was the first of three amendments mandating the consolidation of municipal school districts. Act 561 required that each county school board prepare and submit to the State Department of Public Instruction a plan of organization of school districts into administrative units containing at least 4,000 pupils. Exceptions were permitted provided a unit contained at least 2,500 pupils. Existing agreements for the operation of joint schools were to be respected. If the plan met standards, it was to be submitted for approval by the State Council of Education, predecessor to the State Board. Approved districts would be deemed established on July 1, 1965. Act 561 did not specifically provide for a right of appeal by the school districts affected.

Act 299

Act 561 was superseded in 1963 by another consolidation law to the same ends, the Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. § 2-290, *et seq.* ("Act 299"). Act 299 also required that each county school board prepare and submit to the state a plan of organization of school districts into units of at least 4,000 pupils. Again, exceptions were permitted, but the absolute minimum of 2,500 pupils per unit was eliminated. Existing agreements for the operation of joint schools were to be respected, but an entire joint or union school district could be put in an administrative unit with other districts. Plans which met standards would be sent to the Council of Basic Education for approval. Any school district which felt itself aggrieved by the plan approved by the Council of Basic Education could appeal to the State Board. The State Board could amend the plan or accept it as approved by the Council of Basic Education. The State Board's decision was final unless appealed to the Dauphin County Court under the Administrative Agency Law. Approved school district units would be deemed established as school districts on July 1, 1966.

Act 150

Act 299 was superseded by Act 150 in 1968. Act 150 required the County Board to submit directly to the State Board plans of organization for those separate municipal school districts which had not already been established as school districts under Act 299. Act 150 provided for a minimum of 4,000 pupils per unit, but again exceptions were permitted. The State Board could either approve the plan or amend it. If a district felt aggrieved by the action of the State Board it could appeal to the Court of Common Pleas. Districts approved under Act 150 would be deemed established on July 1, 1969.

Formation of School Districts Involved in this Case

Prior to 1961, efforts, sometimes including financial inducements, were made to encourage school districts to consolidate or merge. *State Board* v. *Franklin Township School District,* 209 Pa. Super. 410, 228 A. 2d 221, 223 (Super. Ct., Pa. 1967). The Superintendent of Schools of Allegheny County encouraged voluntary consolidation of municipal school districts. (P. Ex. 6, 303a-304a) Suggested plans for consolidation were submitted to and approved by the State Council of Education during the 1950s and as late as 1961. (See P. Ex. 35A, 438a-464a) Some municipal school districts, including those which now comprise Churchill, accepted consolidation; others ignored or opposed it.

Under Act 561, the first mandatory consolidation law, the County Board proposed basically the same plans of organization as those developed and approved for voluntary consolidation (compare P. Ex. 35, 406a-437a, with P. Ex. 35A, 438a-464a). Municipal school districts which had joined or merged were kept together and, in some cases, other districts were proposed for consolidation with them. However, Act 561 became the subject of great public controversy, *State Board* v. *Franklin Township, supra,* 228 A. 2d at 224, and no consolidated school district was deemed established under Act 561 before that law was superseded by Act 299.

Under Act 299, the County Board proposed plans which, for many units, were the same as those proposed under Act 561. However, changes were made in the composition of some units (compare P. Ex. 35, 406a-437a, with P. Ex. 36, 465a-498a). The County Board plans were then submitted to and approved by the Council of Basic Education. Some units did not appeal and these were deemed established as school districts units effective July 1, 1966. Other units did appeal to the State Board which, in some cases, made changes. (See P. Ex. 36A, 499a-548a, and P. Ex. 4, p. 2-5, 295a-298a) Further appeals were taken to the courts under the Administrative Agency Law. The Dauphin County Court became "flooded" with over 100 such appeals from throughout the state. Opinion of McKenna, J., *In re Appeal of School District of the Borough of Rankin, et al.*, Nos. SA 544, 556 and 559 of 1969, in the Court of Common Pleas of Allegheny County, Pennsylvania (801a-831a); *State Board* v. *Franklin Township, supra,* 228 A. 2d 221, n.1. In Allegheny County the County Board originally proposed 38 administrative units under Act 299. The State Board expanded the number to 46. Of these, 34 were deemed established as school districts under Act 299. The other 12 raised appeals which were unresolved when Act 299 was superseded by Act 150. (P. Ex. 37, 550a)

Under Act 150 the County Board proposed plans covering the districts which had not been reorganized under Act 299. In most, but not all cases, the County Board plan was the same as the State Board plan under Act 299. (Compare P. Ex. 36A, 499a-548a, with P. Ex. 37, 549a-564a) The State Board made few changes, but some districts took appeals from the State Board. New districts were deemed established on July 1, 1969, or as soon as appeals were concluded.

Of the school districts involved in the remedial phase of this case, five, including Churchill, were formed under Act 299 and were deemed established in 1966. Of these, only Churchill was included in the remedy ordered by the Court. The other four districts included in the remedy were formed under Act 150 and were deemed established in 1969 or later. Because of appeals, General Braddock was not final until 1971 and Swissvale and Edgewood were not final until 1972.

The history of Churchill's formation is quite simple. The plan to form Churchill from the municipal school districts of Forest Hills, Chalfant and Wilkins Township-Churchill was approved by the State Council of Education in 1957. (P. Ex. 35A, p. 10, 447a) These districts voluntarily formed a consolidation by jointure, and Churchill was in operation as a joint district by 1960. Churchill was again approved by the State Council in May, 1961; referenda for union were completed in 1962 and Churchill was certified as the Churchill Union district on July 2, 1962. (1506a) It then had well over 4,000 pupils. (P. Ex. 35, p. 13, 418a) Under Act 561 the County Board proposed that Churchill Union become Unit No. 13. (P. Ex. 35, p. 13, 418a, and P. Ex. 35A, p. 10, 447a) Under Act 299, the County Board resubmitted Churchill Union as Unit No. 15. (P. Ex. 36, p. 15, 475a). The County Board plan for Churchill was approved by the Council of Basic Education on September 9, 1964 (P. 36A, p. 5-213, 516a), and Churchill automatically became established as a school district unit on July 1, 1966.

The history of General Braddock is more complicated. A plan for consolidation of the municipal districts of Braddock, North Braddock, Rankin, East Pittsburgh and Braddock Hills was approved by the State Council in 1958. (P. Ex. 35A, p. 10-11, 447a-448a) These districts, however, did not join or merge. Under Act 561 the County Board proposed that these five municipal districts be organized as Unit No. 14, but some districts raised objections. (P. Ex. 35, p. 14, 419a; P. Ex. 35A, p. 10-11, 447a-448a) Under Act 299 the County Board substituted Turtle Creek for Braddock Hills, and proposed that Braddock, North Braddock, Rankin, East Pittsburgh and Turtle Creek be organized as Unit No. 16. (P. Ex. 36, p. 16, 476a) Braddock Hills was then assigned to Unit No. 38 with Swissvale and Edgewood. (P. Ex. 36, p. 38, 498a) There were further objections. (P. Ex. 45, p. 2, 582a) The Council of Basic Education approved the County Board's plan, but the State Board put Turtle Creek and East Pittsburgh into a separate Unit No. 42 (P. Ex. 36A, 544a). Braddock, North Braddock and Rankin remained as Unit No. 16. (P. Ex. 36A, 517a) Because appeals were taken, these units did not become operative before Act 299 was superseded by Act 150. Under Act 150 the County Board again proposed and the State Board approved Braddock, North Braddock and Rankin as Unit No. 16. (P. Ex. 37, 558a; P. Ex. 10, p. 2, 316a) All three appealed, Braddock and North Braddock preferring to remain separate and Rankin wanting to join Swissdale. The Court of Common Pleas affirmed the General Braddock district as formed. *In re Appeal of School District of the Borough of Rankin, et al., supra.* (801a-831a)

Summary of the Evidence Regarding the Alleged Violations

Plaintiffs' case on liability consisted of a Stipulation of Facts (P. Ex. 61, 696a-707a), numerous exhibits (P. Exs. 1-63, 291a-747a), several affidavits (281a-290a) and the testimony of several witnesses (55a-280a). The State and County Boards called no witnesses and introduced only two exhibits. The Stipulation of Facts and exhibits introduced by Plaintiffs traced the organization of school districts in Allegheny County, and showed the size, racial composition and tax bases of component municipal school districts. In general these showed that Braddock and Rankin, and to a lesser extent North Braddock, were older, had higher black populations and lower tax bases than other school districts in east central Allegheny County.

Among the Exhibits were the Standards for Approval of Administrative Units under Act 150. (P. Ex. 12, 319a-321a) Paragraph 7(c) of the Standards provided that, when considering "community characteristics", a community includes:

> "... one or more municipalities and the surrounding territory from which people come for business, social, recreational, fraternal or similar reasons. Neither race or religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries."

The parties stipulated that both the State and County Boards would offer testimony that, in preparing and approving the plan under Act 150, they did not consider the racial characteristics of any communities affected by the plan because they construed Standard 7 as prohibiting considerations of race. (P. Ex. 61, Paragraphs 19 and 23, 701a-702a)

Also among the exhibits were the Affirmative Action Policy on Education of the Pennsylvania Human Relations Commission (P. Ex. 41, 574a-578a) and the States Desegregation Guidelines for School Districts. (P. Ex. 58, 652a-656a) These documents endorsed the goal of integration and directed school districts to foster integration.

Plaintiffs called nine witnesses, two of whom were called as expert witnesses. The full report of proceedings is included in the Appendix. (55a-280a) Citizens testified that General Braddock was a declining area (103a, 144a, 154a-155a), that there was racial friction (78a, 80a), and that North Braddock and unidentified other districts did not want to merge with Braddock and Rankin because those districts were black and poor. (81a, 117a-120a, 125a-126a) There was testimony that Rankin wanted to remain independent (152a) but, if merged, belonged with Swissvale. (120a, 152a)

An employee of the Pennsylvania Human Relations Commission testified, supported by affidavits, that the Commission had found evidence of racial discrimination in the sale of housing in Braddock, North Braddock, Wilmerding, Turtle Creek, East Pittsburgh, East McKeesport and North Versailles. (108a; 281a-290a) There was no evidence offered of state action in this alleged housing discrimination, nor was any connection shown between the alleged housing discrimination and the school boundary lines. In any event, neither the witness nor the affidavits made any mention of Churchill.

Both of the Plaintiffs' experts described alternatives which they thought would have been better than the consolidation of Braddock, North Braddock and Rankin into one school district. (172a-173a, 225a) None of these alternatives included Churchill.

An employee of the Pennsylvania Human Relations Commission compared the black enrollment and the educational level of the population in General Braddock with the black enrollment and the educational level of the population in adjoining school districts. (255a, 263a) He did not refer to Churchill.

ARGUMENT

Statement of the Standards of Review

The trial court's judgment is predicated on certain erroneous principles of law; to wit: that disproportionate impact or effect establishes a constitutional violation without a showing of discriminatory intent or purpose, that ignoring race constitutes the establishment of an improper racial classification, that a school district which was not available for consolidation with Plaintiffs' school district may be included in the remedy, and that schools have no legal interest in preserving their boundaries and thus are not necessary parties to the violation as well as the remedial phase of the case.

There is also insufficient evidence to support the court's judgment if correct legal principles are applied. There is insufficient evidence to support a finding of discriminatory intent. There is no evidence that Churchill Area School District was the perpetrator of, the product of or affected by a constitutional violation, and thus Churchill may not be included in the remedy.

Summary of the Argument

The extensive history of this litigation may be readily described as a ten-year search for a constitutional violation on which to pin a judicial remedy. The violation has still not been revealed and the remedy is a last-minute concoction in response to an order from this Court to reach an ultimate judgment quickly, *Hoots* v. *Commonwealth,* 639 F. 2d 972, 980-981 (3d Cir. 1981), perhaps in recognition that time was not likely to cure any deficiencies of proof. In fact, the whole quixotic adventure was unsuccessful. Nothing could be done in ninety days that had not been done in ten years. For, as the record reveals, the constitutional violation, like the Holy Grail, has proved elusive. The record is devoid of evidence of any constitutional violation. Moreover, even if this Court should give credence to the trial court's chimera, it should recognize that, under the controlling law, the Churchill district cannot be included in the trial court's fabrication.

> "In any school desegregation case in which plaintiffs seek an interdistrict remedy, the discussion must begin with the seminal case of *Milliken* v. *Bradley,* 418 U. S. 717 (1974). In *Milliken* the Supreme Court of the United States set out the test for imposition of an inter-district remedy:
>
> > 'The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U. S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation.' "
>
> *Armour* v. *Nix,* Civil No. 16708, N.D. Ga. 1979, Opinion entered Sept. 24, 1979, pp. 22-23, aff'd 446 U. S. 930, (1980.)

The case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 410 (1977). There must be evidence of intentional segregative action in order to show a constitutional violation. *Keyes* v. *School District No. 1,* 413 U. S. 189 (1973). The mere fact that school districts are not racially homogenous is not sufficient. *Spencer* v. *Kugler,* 326 F. Supp. 1235 (D.N.J. 1971), aff'd. 404 U. S. 1027 (1972). The requirement that there be a constitutional violation contemplates a substantial violation. *Dayton Board of Education* v.

Brinkman, supra. The racially discriminatory acts must have been a substantial cause of interdistrict segregation. *Milliken* v. *Bradley,* 418 U. S. 717 (1974). The interdistrict effect must be something more than the rippling effect that any activity in a metropolitan area can be expected to have upon all other areas. *Armour* v. *Nix, supra.*

Churchill's first argument is that it is not a violation of the Fourteenth Amendment for a state to maintain adjacent school districts which have disparate proportions of minority students. In the absence of an obligation to redraw school lines to eliminate existing *de jure* dual school systems, there is no obligation to balance the racial makeup of different school districts.

Churchill's second argument is that the absence of proof of discriminatory intent forecloses any claim that official action violated the Equal Protection Clause of the Fourteenth Amendment. The Court found that the effect of the official actions was to promote, perpetuate and maximize racial segregation, but did not find purposeful discrimination or segregative intent. Impact or effect is not sufficient to establish a constitutional violation. The District Court also held that, by refusing to consider race in the establishment of school district lines, the State and County Boards unjustifiably established a racial classification. The refusal of the State and County Boards to consider race as a factor in consolidating school districts does not constitute establishment of an unjustifiable racial classification. Federal law not only permits the State and County to proceed in a racial neutral manner, it generally requires neutrality. That was the principal teaching of *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

Churchill's third argument is that, if there was a constitutional violation shown, the violation did not involve or affect Churchill. Thus the remedy, which dissolves Churchill and merges it into a single New District with General Braddock, Turtle Creek, Swissvale and Edgewood, far exceeds the nature and extent of any violation. The record does not contain a scintilla of evidence that Churchill was ever considered for inclusion with General Braddock or any of its components. To the contrary, in each of the consolidation plans put forth under Acts 561 and 299, Churchill was consistently treated as an independent district. It was never mentioned by the Plaintiffs' experts as among the viable alternatives for General Braddock which the State and County Boards might have adopted. Moreover, Churchill may not be consolidated with General Braddock as part of the remedy because it was barred by valid state law, Act 150, from further consolidation.

Finally, Churchill argues that, since the nature and extent of any violation determines the scope of the remedy, it was a necessary party and should have been made a defendant during the violation phase as well as the remedial phase of the case.

The cases relied upon by the Court in support of its interdistrict remedy are distinguishable. Each of those cases arose in a state which formerly operated a dual school system having interdistrict effects, and the state was under a duty to convert to a unitary system. By contrast, this case does not involve any prior operation of a dual school system, interdistrict or otherwise.

I.

IT IS NOT A VIOLATION OF THE FOURTEENTH AMENDMENT FOR A STATE TO MAINTAIN ADJACENT SCHOOL DISTRICTS WHICH HAVE DISPARATE PROPORTIONS OF MINORITY STUDENTS

In *Wright* v. *Council of City of Emporia,* 407 U. S. 451, 464 (1972), the Supreme Court said: "We need not and do not hold that the disparity in the racial composition of the two systems would be sufficient reason, standing alone, to enjoin the creation of the separate school districts." The Court thought it an important enough proposition to repeat itself later in the opinion, *id.* at 470; "As already noted, our holding today does not rest upon a conclusion that the disparity in racial balance between the city and county schools resulting from separate systems would, absent any other consideration, be unacceptable." The Court has not departed from this rule but rather has reinforced it.

The holding that there was no constitutional obligation to redistrict school systems in order to equalize the racial mix between or among school districts was affirmed by the Supreme Court in *Spencer* v. *Kugler,* 326 F. Supp. 1235 (D. N. J. 1971), aff'd, 404 U. S. 1027 (1972). And the same result was approved even where the disparately composed districts were located in *de jure* segregation States which were under a duty to eliminate all vestiges of the dual school systems they once maintained. *Armour* v. *Nix,* Civil No. 16708 (N. D. Ga. 1979), aff'd 446 U. S. 930 (1980)[1]; see also *School Board of Richmond* v. *State Board of Education,* 462 F. 2d 1058 (4th Cir. 1972), aff'd by equally divided Court, 412 U. S. 92 (1973). Thus, in the absence of an obligation to redraw school lines to eliminate existing *de jure* dual school systems, there is no obligation to balance the racial makeup of different school districts. In the absence of such a constitutional duty, there is no basis for a federal court to compel such action.

Even where a single school system derives from one in which there had been *de jure* segregation, and even where there are identifiably black schools within a single district, the mere fact of such disparity is not enough to justify a "remedy". As the Court pointed out in *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 417 (1977):

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[1] "... lower courts are bound by summary decisions by this Court ' "until such time as the Court informs [them] that [they] are not." ' " *Hicks* v. *Miranda,* 422 U. S. 332, 344-45 (1975).

> "It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Spencer* v. *Kugler,* 404 U. S. 1027 (1972); *Swann* [v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1] at 24. . ."

A fortiori, where the disparity is not among schools within a single district but between and among separate districts, there is no basis for an interdistrict remedy because of that disparity. *Armour* v. *Nix, supra; School Board of Richmond* v. *State Board of Education, supra.*

A fair reading of the record here would suggest that the only evidence of segregation was the fact of disparity in the racial makeup of adjacent school districts. This could not afford a predicate for any remedy, no less one of the breadth of that which was imposed.

II.

IT IS NOT A VIOLATION OF THE FOURTEENTH AMENDMENT FOR THE STATE TO DRAW BOUNDARY LINES SEPARATING SCHOOL DISTRICTS SO THAT A DISTRICT ON ONE SIDE OF THE LINE HAS A DISPARATE NUMBER OF MINORITY STUDENTS

As the Supreme Court recently reiterated in *City of Memphis* v. *Greene,* 49 L. W. 4389, 4394 (1981): "Under the Court's recent decisions in *Washington* v. *Davis,* 426 U. S. 229, and *Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U. S. 252, the absence of proof of discriminating intent forecloses any claim that the official action challenged in this case violates the Equal Protection Clause of the Fourteenth Amendment."

A.

There Can Be No Violation of the Constitution in the Absence of Evidence of Segregatory Intent. There Is No Such Evidence in This Record.

The court below made no finding of intent to discriminate. Instead, it based its decision solely on the effect or impact which resulted from the consolidation of school districts. The transcript of the hearing on violation shows the Court searching for effect rather than the intent of the school authorities' actions.

> "The Court: Well, I don't know if we are interested or not in motive or anything like that, but is the end result such that this was achieved?
>
> "The Witness: That this was achieved was the end result.
>
> "The Court: Does this clearly appear from the statistics?
>
> "The Witness: Yes. I think that clearly appears from the statistics that it was the end result. Why it came about, I can't tell what people's motives were.
>
> "The Court: The end result was a racially segregated and economically deprived area has been included within the boundaries of a new school district?
>
> "The Witness: Yes, sir."
>
> (238a)

The Court's Conclusions of Law, too, deal solely with effect and not intent. Thus is was held that when "the natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into a single district was to perpetuate, exacerbate and maximize segregation . . . such conduct constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment", 359 F. Supp. at 823 (Conclusion 7), and that "when [the state] seeks change. it must proceed in a fashion that will lessen previously existing school segregation", 359 F. Supp. at 823 (Conclusion 8).[2]

These holdings conflict with *Keyes* v. *School District No. 1,* 413 U. S. 189, 198, 208 (1973); *Washington* v. *Davis,* 426 U. S. 229, 242 (1976), and *Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U. S. 252, 265 (1977) which established that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Proof of racially discriminatory intent or purpose is required to show violation of the Equal Protection Clause. The District Court did not abide by these principles. Its decision was erroneously based on the disproportionate impact or effect which resulted when General Braddock was established with a higher percentage of black pupils that other adjacent districts.

B.

The District Court Exacerbated Its Error of Avoiding Any Finding of Intent by Putting the Burden of Proof of Absence of a Violation on the Defendants.

The District Court held that "school authorities are accountable for the natural, probable and foreseeable consequences of their policies and practices, and where racially identifiable schools are the result of such policies, the school authorities bear the burden of showing that such policies are based on educationally required, non-racial considerations." 359 F. Supp. at 823 (Conclusion 4). The Court erred in shifting the burden of proof. Even when such an effect may be foreseeable, the burden of proving the absence of segregative intent or purposeful discrimination does not shift to defendants. As the Supreme Court stated in *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526, 536 n.9 (1979):

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[2] Of course, there can be no "perpetuation, exacerbation, or maximization" of segregation when there is no evidence of segregation to begin with. See part I of this Argument, *supra.*

> "We have never held that as a general proposition the foreseeability of segregative consequences makes out a *prima facie* case of purposeful racial discrimination and shifts the burden of producing evidence to the Defendants if they are to escape judgment; and even more clearly that is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the Defendants."

C.

The Court Erred in Finding that the School Authorities Acted to Satisfy the Desires of Surrounding Municipalities.

The Court found that the State and County Boards combined Braddock, North Braddock and Rankin into one school district to satisfy the desires of surrounding municipalities to be placed in a school district that did not include Braddock and Rankin, 359 F. Supp. at 821 (Finding 59), 359 F. Supp. at 822 (Conclusion 3). The Court made no finding that racial considerations affected the desires of surrounding municipalities and, furthermore, the finding and conclusion it did make is not supported by the record.

The Court based its finding on intuition not facts. It could think of no other explanation for the Board's creation of a school district composed of Braddock, North Braddock and Rankin, and the defendants did not offer an explanation.[3] 359 F. Supp. at 821. The Defendants, however, were not required to offer an explanation, because the Plaintiffs failed to establish a *prima facie* case. Disproportionate impact does not establish a *prima facie* case, proof of purposeful discrimination or segregative intent is necessary. There is little if any creditable evidence of such a purpose or intent. Indeed, Plaintiffs' expert, Dr. Finger, did not believe that the testimony, exhibits and stipulations proved that race was a factor in the formation of General Braddock. (237-238a) The foreseeability of segregative effect does not, in itself, establish intent. In most cases there must be a consistent pattern of segregative effects over a series of events in order that foreseeability may be used to indicate purposeful discrimination, *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U. S. 252, 266 (1977). We do not have here a "stark pattern", as in *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) or *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). Indeed, *Lora* v. *Board of Education of the City of New York,* 623 F. 2d 248, 251 (2d Cir. 1980) holds that foreseeability *per se* is insufficient.

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[3] It should be noted that these school boards, appellants here, were not parties to the "violation" portion of the lawsuit, a matter we address in part IV of the Argument.

Many school districts objected to compulsory consolidation by the state, not on racial grounds but because they preferred to remain independent. Edgewood took its case for independence to the Supreme Court of Pennsylvania. *Appeal of School District of the Borough of Braddock Hills et al,* 445 Pa. 343, 285 A. 2d 880 (1972). Both Braddock and North Braddock, two components of Plaintiffs' school district, asserted their right to independence in the Court of Common Pleas. *In re Appeal of the Borough of Rankin, et al., supra.* This record simply does not support a finding of selection of school district boundaries for the purpose of achieving racial segregation.

D.

Refusal to Consider Race as a Factor in Drawing School District Lines Was Not the Establishment of an Improper Racial Classification.

In fact, the School Boards' actions were found violative of the Constitution not because they were based on racial classifications but because they were not. The Boards were thus to be damned if they did or to be damned if they didn't. In the absence of a dual school system to be eliminated root and branch—and surely there was none here—the Baords could not utilize race as a measure for classification and they did not. The District Court nevertheless held that, by refusing to consider race in the process of drawing the new district lines, the State and County Boards established an improper racial classification. 359 F. Supp. at 823 (Conclusion 9). This is clearly incorrect.

First, a finding that the Boards refused to consider race when adopting consolidation plans underlines the fact that there was no intentional racial discrimination. There can be no violation of the Fourteenth Amendment without intentional racial discrimination; there can be no intent to discriminate by race if race is not a factor in the state's determination.

Second, the record demonstrates that the Commonwealth interpreted the standards adopted under Act 150 to bar consideration of race to avoid invidious racial discrimination. 359 F. Supp. at 812, (P. Ex. 40, 573a) There was no constitutional challenge to the validity of these regulations. The State and County Boards stipulated that they did not take race into account because they construed the standards as prohibiting racial considerations. Certainly it cannot be a violation of the Constitution here for these bodies to refuse to classify by race. It is to be remembered that they were not structuring school systems to remove the effect of prior *de jure* segregation.

Even if the State and County Boards might be permitted to consider race in establishing district lines, they were under no constitutional duty to do so. There is no independent constitutional violation when these agencies decided to ignore a factor which they were not required to consider. Thus, in *Dayton Board of Education* v. *Brinkman,* 433 U. S. at 414, the Supreme Court quoted with approval the Court of Appeal's treatment of a similar question:

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter* v. *Erickson,* 393 U. S. 385 (1960) . . .; *Gomillion* v. *Lightfoot,*

364 U. S. 339 (1960) . . . If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation." *Brinkman* v. *Gilligan,* 503 F. 2d 684, 697 (1974)

The cases relied upon by the District Court to reach its erroneous conclusions are inapposite. *Lee* v. *Nyquist,* 318 F. Supp. 710 (W. D. N. Y. 1970), *aff'd,* 402 U. S. 935 (1971), and *Hunter* v. *Erickson,* 393 U. S. 385 (1969), involved a statute and an ordinance respectively which, in their "historical context", "immediate objective" and "ultimate effect", were intended to frustrate efforts to eliminate segregation. In the instant case the State and County Boards were simply following racially neutral practices in accordance with the decisions of this Circuit and the United States Supreme Court.

III.

THE COURT ERRED BY INCLUDING CHURCHILL IN THE REMEDY. IT WAS NEITHER INVOLVED IN NOR AFFECTED BY ANY CONSTITUTIONAL VIOLATION THAT MIGHT HAVE OCCURRED.

It is difficult, indeed, to discover what the alleged violation may be that is to be used as a predicate for imposing the extraordinary remedy chosen by the trial court here. It cannot be the mere disparity of racial composition of the school districts. It cannot be the failure to draw school boundary lines on the basis of race. Can it be the failure to carry out any one of various proposals for the joinder of Braddock with other school districts? But the Supreme Court has told us, see the quotation from *Dayton,* 433 U. S. at 414, *supra,* that even if such consolidations had taken place, unless there was a constitutional duty to consolidate, there would be no violation in rescinding the order. Here, not only did the Boards not take the step of consolidation, but clearly they were under no constitutional duty to do so. But on any or all of these hypothetical violations, Churchill was not validly included in the school district hypothecated by the trial court.

A.

There Is No Evidence in the Record to Establish that Churchill Was Involved in or Affected by Any Constitutional Violation.

The controlling rule that the remedy must be measured by the constitutional violation was iterated by this Court in *Evans* v. *Buchanan,* 582 F. 2d 750, 757-58 (3d Cir. 1978):

> "We summarized in our prior opinion, and reiterate now, some basic legal precepts relating to the extent of remedies a federal court may order:
>
>> 'A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable. The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. The remedy for a constitutional violation may not be designed to eliminate arguably undesirable states of affairs caused by purely private conduct (*de facto* segregation) or by state conduct which has in it no element of racial discrimination. This much is settled by *Milliken* v. *Bradley,* [418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974)]. *See also Spencer* v. *Kugler,* 404 U. S. 1027, 92 S. Ct. 707, 30 L. Ed. 2d 723 (1972), *affirming* 326 F. Supp. 1235 (D. N. J.); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450. Nor may a remedial desegregation order require "as a matter of substantive constitutional right, any particular degree of racial balance or mixing" [. . .] *Swann* v. *Board of Education, supra,* 402 U. S. [1] at 24, 91 S. Ct. [1267] at 1280 [28 L. Ed. 2d 554] . . . [*See also*] *Milliken* v. *Bradley,* 418 U. S. [717] at 740-41 [94 S. Ct. 3112, 41 L. Ed. 2d 1069]. . . . These are limitations by which a trial court must abide.
>>
>> 'The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects. "As with any equity case, the nature of the violation

> determines the scope of the remedy." *Swann* v. *Board of Education, supra,* 402 U. S. at 16, 91 S. Ct. at 1276.'

"555 F. 2d at 379-80.

"Subsequent to our 1976 decision, the Supreme Court summarized these *same* precepts in *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 419-20, 97 S. Ct. 2766, 2775, 53 L. Ed. 2d 851 (1977):

> 'The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised "only on the basis of a constitutional violation."' [*Milliken* v. *Bradley*], 418 U. S. at 738 [94 S. Ct. 3112, at 3124], quoting *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16 [, 91 S. Ct. 1267, 1276]. *See Rizzo* v. *Goode,* 423 U. S. 362, 377 [, 96 S. Ct. 598, 46 L. Ed. 2d 561]. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' 418 U. S., at 744 [, 94 S. Ct. at 3127, 41 L. Ed. 2d at 1091]; *Swann, supra,* at [402 U. S.] at 16 [, 91 S. Ct. at 1276, 28 L. Ed. 2d at 566]." *Hills, supra,* at 293-294 [96 S. Ct. at 1544]. See also *Austin Independent School Dist.* v. *United States,* 429 U. S. 990, 991 [, 97 S. Ct. 517, 50 L. Ed. 2d 603] (1976) (Powell, J., concurring).'"

Thus, the boundaries of separate autonomous school districts may not be set aside unless there has been a constitutional violation within one district that produced a significant segregative effect in another. *Milliken* v. *Bradley,* 418 U. S. 717 (1974) The Court must determine how much incremental segregative effect the violations had on the racial distribution compared to what it would have been in the absence of the violations, and the remedy must be designed to redress that difference. *Dayton Board of Education* v. *Brinkman,* 433 U. S. at 420. Federal court decrees exceed appropriate limits if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation. *Milliken* v. *Bradley,* 433 U. S. 267, 282 (1977).

Churchill did not engage in nor was it the product of any act of purposeful segregation. The District Court was unequivocal on this point.

> "Churchill is a union school district, created by a referendum of the concerned districts and approved as such by the then State Council on Education on May 29, 1957, and May 17, 1961. It was so considered by the Allegheny County Board plan submitted under Act 299. Therefore, by the terms of Act 150 it was not subject to further reorganization under that Act in 1968. Of more importance in the present case is the fact that Churchill's present boundaries were not created by any actions under Act 150 after 1968 when the alignment of consolidated school districts came into being resulting in the creation of the General Braddock Area School District as a segregated district. Thus no evidence exists of a deliberate, purposeful, segregative intent in the creation of the Churchill district that would subject it to an interdistrict remedy to achieve racial balance." (Memorandum and Order of Nov. 18, 1977, 840a-841a)

Nor was Churchill affected by the alleged violations, as a search of the record confirms. The Court did not find, and there is nothing in the record to suggest, that in the absence of the alleged violations Churchill would have been differently constituted or would have been consolidated with any of General Braddock's putative component school districts. The alleged violations had no bearing on Churchill.

The Court found that the municipal school districts of Forest Hills, Chalfant and Wilkins Township-Churchill voluntarily formed the Churchill Union district. This unit was approved by the State Council in 1957, was in operation by 1960 as a joint district, had its referenda completed by 1962 and was formally established as a union district on July 2, 1962. (2929a-3011a) It more than satisfied the statutory minimum size of 4,000 pupils established by Acts 561 and 299. It had an enrollment of 4,546 in 1961-62, 5,066 in 1963-64 and 5,676 in 1966-67. (418a, 475a, 318a)

The purpose of the state redistricting was to reduce the number of school districts by increasing the size of each district. Although exceptions were permitted, the targeted goal was a minimum of 4,000 pupils per district. The State and County Boards chose to leave intact districts which had voluntarily consolidated and met statutory requirements.[4] Thus, Churchill was never considered for merger with Braddock, North Braddock or Rankin.

Under Act 561 and 299 the County Board variously proposed mergers of Turtle Creek, East Pittsburgh and Braddock Hills with General Braddock's components, Braddock, North Braddock and Rankin. Plaintiffs' witnesses testified about alternatives which would have involved General Braddock's components with Turtle Creek, East Pittsburgh, Braddock Hills and Swissvale. (172a, 225a) A witness compared statistics on the black-white populations and the education levels in communities adjoining General Braddock, and referred specifically to Turtle Creek, East Pittsburgh, Braddock Hills, Swissvale and Edgewood. (255a-256a, 263a) Another witness testified about discrimination in the sale of housing in communities near General Braddock, mentioning Swissvale, East Pittsburgh, Turtle Creek, Wilmerding, East McKeesport and North Versailles. (243a, 281-290a) The so-called housing violations were unconnected to the consolidation issues and, in any event, were insufficient to warrant relief. *Armour* v. *Nix, supra.* Moreover, Churchill was never mentioned in any of this testimony. In summary, the record is devoid of evidence that Churchill is the product of or affected by the alleged Constitutional violations.

The rationale which the Court offered for including Churchill in the remedy was that Churchill could have been consolidated with General Braddock's component districts under Acts 561 and 299. We agree that under Acts 561 and 299 the State and County Boards could have included Churchill or any other school district with General Braddock. But the Court's reasoning is faulty on two grounds. First, if a violation occurred, it occurred under Act 150, not under Act 561 or 299. We address this issue in the next section of the Brief. Second, the fact that the Boards could have included Churchill with General Braddock under Acts 561 or 299 proves nothing as to whether the Boards would have done so or should have done so, absent the alleged violations. The Boards could have done many things under Acts 561 and 299. They could have consolidated Gateway, Wilkinsburg, East Allegheny, West Mifflin, Steel Valley or any other separate school district with General Braddock. They could possibly have made the entire county a single district. The issue, however, is whether there is any evidence in the record to show that, but for the alleged constitutional violations, Churchill would have been included with General Braddock. There is no such evidence. The trial court dismissed Steel Valley and West Mifflin from the remedial proceedings on the grounds, *inter alia,* that neither was "involved in the jointure, consolidation or merger of the school districts which eventually led to the creation of the General Braddock Area School District." (510 F. Supp at 622.) Churchill was not involved in these matters either, yet it was included in the remedy.

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[4] Some joint or union districts having fewer than 4,000 pupils were merged with other districts, e.g. Unit 63-11 (471a), Unit 63-18 (478a), Unit 63-35 (495a)

Judicial speculation or judicial predilection is not an adequate basis to justify the trial court's recreation of the school systems of Allegheny County to make one to its own taste that included Churchill although that school system was never considered for further consolidation by those with the authority to do so. Again, as the Supreme Court said in ***Dayton,*** 433 U. S. at 410:

> "There is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional

violations on the part of school officials are proved. *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973); *Wright* v. *Council of City of Emporia,* 407 U. S. 451 (1972); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971). But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U. S. 717, 741-42 (1974); *San Antonio School District* v. *Rodriguez,* 411 U. S. 1 (1973); *Wright* v. *Council of City of Emporia, supra,* at 469. It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. Cf. *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976)."

In support of its interdistrict remedy the Court cited *Morrilton School District No. 32* v. *United States,* 606 F. 2d 222 (8th Cir. 1979), *cert. denied* 444 U. S. 1071 (1980); *Evans* v. *Buchanan,* 416 F. Supp. 328 (D. Del. 1976), *aff'd,* 555 F. 2d 373 (3d Cir. 1977); and *United States* v. *Board of School Commissioners of the City of Indianapolis,* 541 F. 2d 1211 (7th Cir. 1976). Those cases are not controlling here. They all involve interdistrict remedies necessary to eliminate existing unconstitutional, *de jure,* dual school systems. There was a finding in each of these cases that the state had operated a dual school system and was under a continuing duty to eliminate all vestiges of that system. In *Morrilton* and *Evans* there were findings that the dual school systems had significant interdistrict effects. In *Indianapolis* there was a finding that, but for the action of the state legislature taken while the state was under an obligation to desegregate Indianapolis schools, the Indianapolis School Board would have been permitted voluntarily to adopt a countywide plan of school reorganization to eliminate dual school systems. Thus in each of these cases, a broad interdistrict remedy was appropriate.

In *Evans* both this Court and the Supreme Court recognized that Delaware's prior maintenance of a dual school system was the fundamental difference between that situation and the situation in cases arising in jurisdictions where segregation was not historically required by state law. In an appeal to this Court from a district court order providing an interdistrict remedy, the defendants argued that the district court had failed to determine the exact amount of "incremental segregative effect" flowing from the violation, as required by *Dayton I*. This Court held that there was no need for a specific finding of the incremental segregative effect of the violation because in *Evans,* unlike *Dayton I,* Delaware was under an obligation to eliminate a dual school system, which obligation had not yet been fulfilled.

> "And finally, the unavoidable distinction is that prior to *Brown I,* in New Castle County, Delaware, *desegregation* was unlawful under Delaware law; in Dayton, Ohio *segregation* was unlawful under Ohio law. This difference between the two states is, at base, the difference between the two cases." 582 F. 2d at 766.

Mr. Justice Brennan made the same distinction in denying a stay of this Court's judgment and mandate.

> "The facts of *Dayton* are fundamentally different from the circumstances presented by this application. Segregation in Delaware unlike that in Ohio, was mandated by law until 1954. In the instant case the District Court found that 'at that time . . . Wilmington and suburban districts were not meaningfully "separate and autonomous" because "*de jure* segregation in New Castle County was a cooperative venture involving both city and suburbs".' 393 F. Supp. 428, 437 (1975). So far from finding only isolated examples of unconstitutional action, the District Court in this case concluded 'that segregated schooling in Wilmington has never been eliminated and that there still exists a dual school system.' " *Evans* v. *Buchanan,* 439 U. S. 1360, 1362-63 (1978)

The instant case is plainly different. Pennsylvania has never operated a dual school system. The County and State Boards and the Commonwealth were under no obligation to eliminate a dual school system. Their only obligation was to avoid intentional acts of racial discrimination while consolidating school districts. If any such acts were perpetrated, which Churchill denies, the scope of the remedy is limited by the nature and extent of the acts themselves. There was absolutely no evidence that the incremental segregative effect of any such acts extended to Churchill, or that Churchill would have been consolidated with any of General Braddock's components in the absence of the alleged constitutional violations. Consequently the remedy, which dissolves Churchill and merges it with General Braddock and others, violates the limitations set forth in *Milliken I.*

The District Court included Churchill in the remedy without any showing that the incremental effect of any alleged constitutional violation extended to Churchill. The Court did this because Churchill would round out the district geographically, because Churchill had a substantial white population which would improve the racial balance, and because Churchill would add financial strength to the New District. In so doing, the District Court violated clear directives of this Court and the Supreme Court as heretofore set out.

B.

Churchill Was Established Under Act 299 and Could Not Have Been Merged With General Braddock Under Act 150.

The Amended Complaint charged that General Braddock, Turtle Creek, Swissvale, Edgewood and Churchill were established as racially segregated school districts under Act 150. The trial court found otherwise. The parties stipulated and the evidence clearly showed that Churchill was established under Act 299. On the other hand the trial court found, and the evidence clearly showed, that General Braddock, Turtle Creek, Swissvale and Edgewood were established under Act 150.

Act 150 excluded from the consolidation process those districts which had already been established under Act 299. The constitutionality of this provision has not been challenged. During the hearing on liability the Court asked whether Plaintiffs were challenging the constitutionality of Act 150, suggesting that a three-judge court would be required. Counsel assured the Court that Plaintiffs were not making this challenge. (225a-226a) Since General Braddock was formed under Act 150 whereas Churchill was formed under its predecessor, Act 299, Churchill was not eligible for inclusion with General Braddock. Therefore, any constitutional violation involved in forming General Braddock cannot extend to Churchill, and Churchill cannot be part of the remedy.

The District Court's rationale for including Churchill in the remedy although it was not formed under Act 150 was twofold. First, the court erroneously said that the alleged violations against General Braddock began with Act 561. Secondly, the court erroneously said that in any event Act 150 "cannot eliminate any school district from a future remedial plan of this court or the State". 510 F. Supp. at 621

The District Court erred in finding that the alleged violations occurred under Acts 561 and 299. If there were violations, they occurred when General Braddock was established as a combination of Braddock, North Braddock and Rankin. Various combinations, including General Braddock's ultimate combination, were proposed under Acts 561 and 299 but General Braddock was actually established under Act 150. The basis of the Court's finding that violations occurred prior to Act 150 is its finding that other districts were eliminated from consideration for merger under Acts 561 and 299 thereby "leaving General Braddock School District in an isolated position". 510 F. Supp. at 621. The record simply does not support that finding. Many districts, including Churchill, were eliminated from consideration for merger prior to Act 150. Every school district which the Boards proposed for merger with General Braddock, however, was still available under Act 150. Every school district which, in the violation phase of the case, the Plaintiffs witnesses said was a viable alternative for merger with General Braddock, was still available under Act 150. Indeed every school district which the trial court found to be an alternative, 359 F. Supp. at 817, was still available under Act 150. Thus, if it was a violation to establish General Braddock by failing to include other school districts with Braddock, North Braddock, and Rankin, that violation occurred under Act 150.

Insofar as the Court's finding that "Act 150 cannot eliminate any of the school districts from a future remedial plan of this Court or the State", 510 F. Supp. at 621, the Court either misunderstood the authority it relied on or flatly ignored *Milliken I. Milliken I* held that the scope of the remedy is determined by the nature and extent of the wrong. If Act 150 excluded Churchill for reasons other than segregation objectives, which was the case, then Churchill was not part of any wrong nor affected by it, and may not be part of the remedy.

We believe that the Court did not ignore *Milliken I* but simply misunderstood, or at least misapplied, *Chartiers Valley Joint Schools* v. *Allegheny County Board,* 418 Pa. 520, 211 A 2d 487 (1965). That case stands for the proposition that a school district does not have a vested right to its boundaries and the Legislature may change them. A holding that the Legislature may eliminate the Act 150 exemptions, which is the essence of *Chartiers* as applied to this case, has no bearing on the question whether Churchill was unavailable for merger at the time General Braddock was established. To repeat, the constitutionality of Act 150 has not been challenged. Act 150 barred further merger of those school districts which had been established under Act 299. Churchill was established under Act 299. Therefore, Churchill was, for valid state purposes, excused from merger with General Braddock and must be excluded from the remedy.

The evidence shows that each of the municipal school districts which, under Acts 561 and 299, was considered for merger with General Braddock, was still available for merger when the State and County Boards took action under Act 150. Conversely, Churchill, which was not available under Act 150, had never been considered for merger with General Braddock under either Act 561 or Act 299. The Plaintiffs' evidence during the remedial phase of this case showed that a four district remedy, General Braddock-Turtle Creek-Edgewood-Swissvale, would produce an integrated and viable district. (See p. 10, Reply Brief for Appellants, filed by Plaintiffs in *Hoots* v. *Commonwealth,* 639 F. 2d 972, No. 80-2116 (3rd Cir. 1981) Those four districts were available under Act 150. General Braddock was not left "in an isolated position" without viable merger partners under Act 150. Any violation inherent in forming General Braddock occurred under Act 150. The District Court erred by including Churchill in the remedy, since it was not eligible for merger with General Braddock when that district was established.

IV.

THE SCHOOL DISTRICTS SUBJECT TO THE REMEDIAL ORDER SHOULD HAVE BEEN AFFORDED A COMPLETE HEARING ON THE NATURE AND EXTENT OF THE ALLEGED VIOLATIONS.

Rule 19(a)(2)(i) of the Federal Rules of Civil Procedure provides that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction shall be joined as a party if he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest. None of the school districts affected by the trial court's remedial order were defendants during the violation phase of the case. In response to Motions by the Commonwealth, and the State and County Boards, the Court ruled that the districts were not necessary parties. The Court's reasoning was that, since the power to draw school district boundaries rests solely with the Commonwealth and the State Board, the surrounding school districts had "no legal right to have their existing boundaries maintained and consequently . . . no legal interest . . . which can be affected by the outcome of the litigation." *Hoots* v. *Commonwealth,* 359 F. Supp. at 821. The Court did permit and eventually required school districts to participate in remedial proceedings.

The trial court's underlying premise, that the school districts have no legal interest which can be affected by the outcome of the litigation, conflicts squarely with the principles of *Milliken I.* In Michigan, as in Pennsylvania, school districts are instrumentalities of the state and subordinate to the State Board of Education and the legislature. In Michigan, as in Pennsylvania, it is the state which is charged with providing a system of public education, and school districts are not part of the local self-government except as the legislature might choose to make them so. *Milliken* v. *Bradley,* 418 U. S. at 726, n. 5. Yet the Supreme Court held:

> ". . . the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . . local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'

> "The Michigan educational structure involved in this case, in common with most States, provides for a large measure of local control and a review of the scope and character of these local powers indicates the extent to which the interdistrict remedy approved by the two courts could disrupt and alter the structure of public education. . . ."
>
> Id. at 741-42

Because the record showed no interdistrict violation, the Supreme Court in *Milliken I* did not reach the claims of the suburban school districts that they had been denied due process by the manner in which their participation was limited.

We have a similar case here. The record contains no evidence that Churchill perpetrated, was the product of or was affected by, any unconstitutional act. Consequently, the Court should not have to reach this necessary party or due process issue, at least as to Churchill. If, however, this Court concludes that Churchill was affected by some constitutional violation, then Churchill was indeed harmed by the failure of the trial court to treat it as a necessary party and required defendant for the violation as well as the remedial phases of the case.

As we have emphasized, the scope of the remedy is determined by the nature and extent of the violation. Any party to be affected by a remedial order should be made a full participant in the proceedings which determines the violation. No school district should be excluded simply because the legislature may, if it so chooses, change that district's boundaries. Until proper authorities make such a change, local school districts are duly constituted entities whose existence may not be ignored. That is an essential teaching of *Milliken I*.

CONCLUSION

The District Court decisions are incorrect in several respects. There was no finding of segregative intent, and there is insufficient evidence to support such a finding. A refusal to consider racial criteria when drawing school district lines does not constitute the establishment of an explicit and improper racial classification. There was absolutely no evidence that Churchill engaged in, was the product of or was affected by any discriminatory act, and thus any remedy applied to Churchill exceeds the nature and extent of any violation proved.

For these reasons the judgment of the District Court should be reversed and the Amended Complaint dismissed as to all parties, and certainly as to Churchill. If there are to be any further proceedings in the case, the remand should include instructions that Churchill should not be included in any remedy ordered by the trial court.

Respectfully submitted,

J. ROBERT MAXWELL, ESQ.
MAXWELL AND HUSS
Farmers Bank Building
301—Fifth Avenue
Pittsburgh, Pennsylvania 15222
(412) 281-1658
Attorney for Churchill Area School District, Appellant

PHILIP B. KURLAND
JOHN J. COFFEY
ROTHSCHILD, BARRY & MYERS
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
Of Counsel

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE MARTIN, ET AL,

Petitioners

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

and

CARRIE L. GRAVES, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WHITEFORD S. BLAKENEY
Attorney for the Petitioners
and
Counsel of Record
3450 NCNB Plaza
Charlotte, North Carolina 28280
(704) — 372-3680

Of Counsel:

BLAKENEY, ALEXANDER & MACHEN
Charlotte, North Carolina 28280

QUESTIONS PRESENTED FOR REVIEW

1. When, in order to remedy racially segregative attendance assignments in a public school system, a United States District Court has directed the authorities of that school system to put into effect racially integrative attendance assignments as specifically prescribed by the Court, and the school authorities having thereafter done so, and admixtures of races having been fully achieved in each and all of the schools in the exact ratios of race designated by the Court orders — but variances from such racial attendance ratios having subsequently developed in some of the schools, though not by reason of any reoccurrence of official segregative actions — are not the pupils in these schools entitled to constitutional protection against being again reassigned, on account of their race, and compulsorily moved here and there among the schools of this system for the purpose of continually re-creating racial ratios as desired by the District Court or by the school authorities?

2. Do not the decisions of this Court, in *Brown vs. Board of Education* and *Swann vs. Charlotte-Mecklenburg Board of Education* and *Pasadena City Board of Education vs. Spangler,* assure to the school pupils, in this situation, constitutional protection against being repeatedly subjected, because of their race, to such compulsion at the hands of governmental authorities?

LISTING OF ALL THE PARTIES IN THE CASE

The plaintiffs in the case, now Petitioners to this Court, are as follows: — GEORGE MARTIN, for himself and in behalf of his minor children, ELLEN and CATHERINE MARTIN; MR. and MRS. J. D. WALL, for themselves and in behalf of their minor children, CHRIS and STEVE WALL; JOHN and SUSAN ALDEN, for themselves and in behalf of their minor children, SUZANNE and SCOTT ALDEN; MR. and MRS. RICHARD K. DUNHAM, for themselves and in behalf of their minor children, SCOTT and KRISTIN DUNHAM; MRS. NANCY KATE GORDON, for herself and in behalf of her minor children, ADAM, KERRY, DAWN AND SEHM GORDON; John and PRISCILLA HURLEY, for themselves and in behalf of their minor children, NICOLE and TIFFANY HURLEY; MR. and MRS. JAMES H. JONES, for themselves and in behalf of their minor child, ROBYN JONES; ANDREW C. JOHNSON, for himself and in behalf of his minor children, TRACEY and RANDY JOHNSON; DARRELL and SANDY MYERS, for themselves and in behalf of their minor children, TIFFANY and ZACHARY MYERS; HENRY and JOHANNA L. ASHBAUGH, for themselves and in behalf of their minor children, HENRY and CHANNING ASHBAUGH, MR. and MRS. M. B. CAMPBELL, JR., for themselves and in behalf of their minor children, BINFORD and BRADLEY CAMPBELL; LARRY L. and PHYLLIS C. FALCONE, for themselves and in behalf of their minor children, MICHELLE and MATTHEW FALCONE; MRS. MARLENE BEAVER, for herself and in behalf of her minor child, SUZIE BEAVER; DR. and MRS. EDWARD BONOMO, for themselves and in behalf of their minor child, TRICIA BONOMO; TONY and JUDITH AREY, for themselves and in behalf of their minor children, ASHLEY and BRENT AREY; MRS. PATRICIA M. BOWER, for herself and in behalf of her minor children, SCOTT and

MARK BOWER; THOMAS and EDWINA GIBSON, for themselves and in behalf of their minor children, TRACYE, BRANDY and ASHLEY GIBSON; MR. and MRS. PATRICK DOHERTY, for themselves and in behalf of their minor child, JEFFREY DOHERTY; DON and BETTY ANDERSON, for themselves and in behalf of their minor children, BRIAN and BETH ANDERSON; MRS. BARBARA GROCE, for herself and in behalf of her minor children, HAL, MARTHA and CLARK GROCE; MR. and MRS. JAMES E. TOWNSEND, for themselves and in behalf of their minor child, DONNA TOWNSEND; MR. and MRS. CHARLES GUIDUCCI, for themselves and in behalf of their minor children, KIM and LORI GUIDUCCI; MRS. MARTHA MCWATTERS, for herself and in behalf of her minor children, DARREN and JENNIFER MCWATTERS; TOM and CAROLYN IRVIN, for themselves and in behalf of their minor child, ERIC IRVIN; MR. and MRS. SIMON IYOOB, for themselves and in behalf of their minor children, JOHN and FRANK IYOOB; MR. and MRS. WAYNE KELLY, for themselves and in behalf of their minor child, JEFF KELLY; NEIL and REBECCA MCDUFFIE, for themselves and in behalf of their minor children, KIMBERLY, SHARON and PATTI MCDUFFIE; MRS. CHRISTIE T. CARMER, for herself and in behalf of her minor child, ROBERT ANTHONY CARMER; CARL and JACKIE BINNEY, for themselves and in behalf of their minor children, JASON and MARTY BINNEY; MR. and MRS. ARTHUR TARLETON, for themselves and in behalf of their minor child, ART TARLETON; MR. and MRS. MARC EPSTEIN, for themselves and in behalf of their minor children, KELLY and BRADLEY EPSTEIN; SPENCER and MARILYN GAYLORD, for themselves and in behalf of their minor children, LISA and David Gaylord; Mr. and Mrs. James H. Cropper, for themselves and in behalf of their minor child, Cheryl Cropper; William and Kathleen Shake, for themselves and in behalf of their minor children, Julie and Jeff Shake; Mr. and Mrs. Joe McCrorey, for themselves and in behalf of their minor children, Mark and Jason McCrorey; Mr. and Mrs. T. G. Roche, for themselves and in behalf of their minor children, Anna and Geddings Roche; James and Elizabeth Moorhead, for themselves and in behalf of their minor children, Debbie and Wendy Moorhead; Mrs. W. F. McGinty, for herself and in behalf of her minor children, Mark and Gretchen McGinty; Robert and Kathryn Schlau, for themselves and in behalf of their minor child, Brian Schlau; Mrs. Mary K. Paden, for herself and in behalf of her minor child, James Paden; Mr. and Mrs. John Shriver, Jr., for themselves and in behalf of their minor children, Sue and Chris Shriver; Mr. and Mrs. Richard Shanklin, for themselves and in behalf of their minor children, Mathew and Kelly Shanklin; Mr. and Mrs. George Wightman, for themselves and in behalf of their minor children, Shannon and Michelle Wightman; and Mr. and Mrs. J. Andrew Williams, for themselves and in behalf of their minor children, Todd, Pamela and Allison Williams.

The defendant in the case is the Charlotte-Mecklenburg Board of Education.

Intervenor defendants in the case are as follows: — Carrie L. Graves, on her own behalf and on behalf of her minor children, CARLA PLATT, GORDON PLATT and LAMONT PLATT; GAYNELL HARRIS GRIER, on her own behalf and on behalf of her minor child, SEBRINA GRIER; ROBERTA S. THOMPSON, on her own behalf and on behalf of her minor children, JAMES L. THOMPSON and LADONNA R. THOMPSON; SARAH R. MASON, on her own behalf and on behalf of her minor children, JACQUELINE DENISE MASON and JADE DAVENE MASON; ELMA ELLISON, on her own behalf and on behalf of her minor children, TARA ELLISON and BRETINSA ELLISON; MABEL JONES, on her own behalf and on behalf of her minor children, JACQUELINE JONES, LESLIE SHARON JONES, ERIC JONES, IRVIN JONES, RAYFORD JONES, JR., and FELECIA JONES.

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The opinion of the United States Court of Appeals is published at 626 F. 2d 1165 (4th Cir., 1980), and is also printed in the Appendix to this Petition.

The opinion of the District Court is published at 475 F. Supp. 1318 (W.D.N.C., 1979). The District Court's opinion is lengthy and is therefore set forth in a separate Appendix filed herewith.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals, embodying its decision and judgment, is dated July 23, 1980, and was entered on that date.

Thereafter, the Petitioners applied to the Court of Appeals for permission to file a Petition for Rehearing. The Court of Appeals granted such request for permission to file Petition for Rehearing, but ruled on the merits against rehearing, on October 14, 1980. The filing of this Petition for Certiorari is within ninety days from the date of such denial of rehearing. *Bowman vs. Loperena*, 311 U.S. 262, 266.

Jurisdiction to review the decision of the Court of Appeals, by writ of certiorari, is conferred on this Court by the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> "No person ... shall be ... deprived of life, liberty or property, without due process of law".
>
> Fifth Amendment to the
> Constitution of the United States

"No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Fourteenth Amendment to the
Constitution of the United States

"No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. . . . No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin".

General Statutes of North
Carolina, Section 115-176.1

STATEMENT OF THE CASE

This suit was brought by the plaintiffs, who are now Petitioners before this Court, for themselves and in behalf of their minor children, pupils in the schools of the Charlotte-Mecklenburg public school system. The action was instituted in the United States District Court for the Western District of North Carolina, that Court having jurisdiction by reason of the plaintiffs' allegations that they were being deprived of rights assured to them by the Constitution of the United States and by the decisions of this Court.

The plaintiffs asked for injunctive relief, which the District Court, after a hearing, denied. Upon appeal by the plaintiffs, the Court of Appeals affirmed the ruling of the District Court.

In *Swann vs. Charlotte-Mecklenburg Board of Education*[1], this Court upheld findings and conclusions by the same District Court that there had been racially segregative attendance assignments in the Charlotte-Mecklenburg public school system, and that by way of remedy and correction it was proper and appropriate for the District Court to direct that racially integregative assignments be put into effect in these schools.

Although this Court stated in *Swann* that it expressly rejected any concept that the District Court should or could require "any particular degree of racial balance or mixing"[2], the orders of the District Court, both prior and subsequent to this Court's decision, did direct the Charlotte-Mecklenburg school authorities to assign the school pupils in such manner that there would be a "particular degree of racial balance or mixing" of black and white pupils in each of the schools of the Charlotte-Mecklenburg system[3], namely, that there must be blacks assigned to each school, but that blacks must constitute not more than 50 percent of the student body in any school[4].

---

[1] 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed 2d 554 (1971).

[2] *Swann*, 402 U.S. 1, 24, 28 L. Ed. 2d 554, 571.

[3] Except as to one school, known as "Hidden Valley" which the District Court has all along permitted to be operated with a black enrollment "exceeding 50 percent" of the student body.

[4] The District Court's Orders of February 5, 1970, June 29, 1971, and July 30, 1974, in *Swann* and plaintiffs' Exhibit 1, 428, 454-456, in the present case.

Unless otherwise indicated, all page references in this Petition are to the Joint Appendix filed with the Court of Appeals and transmitted, along with the District Court file, to the Office of the Clerk of this Court.

Both before and after the decision of this Court in *Swann*, the Charlotte-Mecklenburg school authorities instituted various programs of racially integrative pupil assignments in the Charlotte-Mecklenburg schools. The District Court, however, successively found the operation of these programs to be inadequate to the accomplishment of the Court's racial specifications.

In response to the repeated directives of the District Court, the School Board, in 1974, laid before the Court a detailed plan setting forth an exact blueprint as to how many black pupils and how many white pupils would be moved from which schools and to which schools[1], and stating what would be the resulting percentages or ratios of blacks and whites in each of the schools in the system — and projecting that upon the implementation of this program, blacks would be in attendance at each school, but would not exceed 50 per cent of the student body in any school[2]. The Court thereupon ordered that this plan be put into force and effect.

In April of 1975, the School Board filed in the District Court a "Report To The Court" with respect to implementation of this plan and program[3]. The Report stated that "the guidelines and policies as outlined in the plan have been carried out" — that the Board and its staff "working together have shown good faith and have without exception followed the guidelines" of the plan as ordered by the Court — and that blacks and whites were attending every Charlotte-Mecklenburg school, with blacks constituting not more than 50 per cent of the student body in any school[1].

---

[1] There are some 105 schools in the Charlotte-Mecklenburg school system.

[2] Plaintiffs' Exhibit 1, 428, 454-456.

[3] Plaintiff's Exhibit 2, 458.

The School Board thereupon asked for, and the plaintiffs in the *Swann* case agreed to, a "dismissal" of the *Swann* case, and the District Court, on July 11, 1975, directed that "the file" in the *Swann* case "be closed".

Approximately four years after the 1974 program had been put into effect, the School Board reported to the District Court that variances from the District Court's prescribed proportions of black and white pupils had gradually developed, and that the Court's directive that blacks should not constitute more than 50 per cent of the student body in any school was being exceeded in eight schools. With this report, the Board presented a new pupil assignment plan for the school year 1978-79, entitled "Minimal Approach To Reduce Ratios Below 50%"[2]. This plan directed that 4,825 pupils must change schools, thereby altering racial proportions in seventy-six schools[3].

The plan incidentally explained the closing of a "relatively new" school, pointing out that its "trend" was expected to "continue to be one of increasing ratio[1] and decreasing enrollment", and that therefore it was being shut down[2].

---

[1] Plaintiffs' Exhibit 2, 461, 462, 464, 480-488 — again with the exception previously authorized by the Court as to the "Hidden Valley" school.

[2] Plaintiffs' Exhibit 3, 489, et seq.

[3] Plaintiffs' Exhibit 3, 490-508.

Further, the report to the Court stated that:

"The total black student ratio continues to increase by about one per cent each year and is presently approximately 37%".

. . .

"... [W]e are concerned about many of the changes and more deeply concerned about the direction in which we seem to be headed".

. . .

"With a rising black ratio in the total student population, it becomes increasingly difficult to keep all individual schools below a fixed 50 per cent ceiling".

. . .

"*...[T]o relieve high ratio problems, it becomes necessary to set up long-distance busing or break up large numbers of existing relationships*" (Emphasis in original).

. . .

"The longer we want a ratio adjustment to keep a school under 50 per cent, the lower we must set the initial ratio".

. . .

"A lower initial ratio means more children on the move, and the greater the number of children on the move, the greater the likelihood of long distance busing".

---

[1] In all the pupil assignment documents and records, the term "ratio" is uniformly used as meaning the percentage of blacks in a school.

[2] Joint Appendix, 310, Plaintiffs' Exhibit 3, 507.

> "The [following is the] most efficient type of adjustment for the type of problem situation here under consideration ('efficient' is used here in the sense of getting the necessary ratio modification with a minimum number of students to be changed)":
>
> "a. If the problem is a combination of high ratio and over-capacity, reassign black students".
>
> "b. If the problem is high ratio and under-utilization, add white students".
>
> "c. If the problem is high ratio and the projected membership is such that the desired ratio reduction cannot be achieved by removing black students (without causing under-utilization), use a combined movement of whites in and blacks out . . ."[1].

Despite the urgent protests of many parents and pupils[2], and the filing of the present suit, this broad program of compulsory school reassignments, for the purpose of again rearranging racial proportions in the schools, was put into effect—and the plaintiffs' plea for an injunction was rejected.

More recently, the School Board has made public announcement that again there are several schools in the Charlotte-Mecklenburg system which are exceeding the prescribed racial ratio; that seventeen other schools are presently in the range of 46 to 50 per cent black; and that additional large-scale reassignments of pupils, for purposes of still further racial realignments, are in prospect.

---

[1] Plaintiffs' Exhibit 3, 509, 510, 512, 513, 514.

[2] For some of whom this was the third time they had been forced to change schools on account of their race. Joint Appendix, 10, 14.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

I.

The Central Rulings Of *Brown*, Of *Swann* And Of *Pasadena* With Respect To Constitutional Limitation Upon Public School Assignments Based on Race

The same public school system which, ten years ago, was the subject of this Court's leading decision in *Swann vs. Charlotte-Mecklenburg Board of Education*[1], is now before this Court again, upon the present Petition for Writ of Certiorari. In brief, the situation is that the directive of "remedial" racial school assignments, which was sustained by this Court in *Swann,* has been obeyed and should now be lifted — as this Court foresaw and projected in *Swann* and explicitly thereafter ruled in the case of *Pasadena City Board of Education vs. Spangler*[2].

The question is no longer whether racial assignments may be required for an "interim" in the Charlotte-Mecklenburg school system, but whether racial assignments and reassignments are to be imposed upon the pupils in these schools on a continuing basis, repeatedly and without end.

It is always to be borne in mind that the basic principle established in *Brown vs. Board of Education*[3] was that from that time forward admission to public schools must be "on a non-racial basis"[1]. Likewise, it is to be remembered that in *Swann*, this Court emphasized that it was countenancing exception to that fundamental mandate and upholding the District Court's Orders for racial assignments in the Charlotte-Mecklenburg schools only "as an interim corrective measure"[2].

---

[1] 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed 2d 544 (1971).

[2] 427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed 2d 599 (1976).

[3] 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed 873 (1954) and 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed 1083 (1955).

In 1976, this Court firmly applied this "interim" limitation, and specifically struck down continuing racial assignments in a situation paralleling all of the pertinent circumstances of the present case. In that case, *Pasadena City Board of Education vs. Spangler*[3], as in the present case, the school authorities had put into effect "a plan for desegregating" the public schools as required by the District Court[4]. There, as here, the plan provided for pupil attendance assignments that would eliminate all instances of "minority students" constituting "a majority" of the student body in any school[5]. In *Pasadena*, as in the present case, "the initial implementation" of the plan by the District Court, did accomplish the racial proportions which the Court had ordered[6].

---

[1] *Brown*, 349 U.S. 294, 301, 99 L. Ed. 1083, 1106.

[2] *Swann*, 402 U.S. 1, 27, 28 L. Ed 2d 554, 573.

[3] *Pasadena City Board of Education vs. Spangler*, 427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed 2d 599 (1976).

[4] *Pasadena*, 427 U.S. 424, 428, 49 L. Ed 2d 599, 604.

[5] Idem.

[6] *Pasadena*, 427 U.S. 424, 436-437, 49 L. Ed 2d 599, 608-609.

Thereafter, however, at each of several schools, in *Pasadena* as in the present case, there gradually developed a "black student enrollment" exceeding "50% of the school's total enrollment"[1]. In *Pasadena,* the number of schools thus varying from the prescribed racial ratio some three years after the achievement thereof, was five out of the thirty-two schools in the system[2]. In Charlotte-Mecklenburg, the number of schools varying from the same prescribed racial ratio, approxiimately four years after the achievement thereof, was, as hereinabove noted, eight out of the one hundred and five schools in the system[3].

In its *Pasadena* decision, after quoting from its language in *Swann* to the effect that "it does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so", this Court then went on to say:

> "It may well be that petitioners have not yet totally achieved the unitary system contemplated by this quotation from Swann ... But that does not undercut the force of the principle underlying the quoted language from Swann. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's

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[1] *Pasadena,* 427 U.S. 424, 431, 433-434, 49 L. Ed 2d 599, 605, 606, 607.

[2] *Pasadena,* 427 U.S. 424, 431, 433-434, 49 L. Ed 2d 599, 605, 606-607.

[3] Plaintiffs' Exhibit 3, 492-508.

public schools. No one disputes that *the initial implementation* of this plan accomplished *that*[1] objective. That being the case, the District Court *was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity*. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court *had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns*" (emphasis supplied).

Pasadena, 427 U.S. 424, 436-437,
49 L. Ed 2d 599, 608-609

It is respectfully submitted that the application of this ruling, foreseen in *Swann*, and explicitly thus enunciated in *Pasadena*, cannot rightly now be denied to the plaintiffs in the present case.

II.

Remedial Racial Assignments Were Put Into Effect In The Charlotte-Mecklenburg Schools, Specifically As Ordered By The District Court, And Did Accomplish Corrective Racial Ratios In Each And All Of The Schools, Specifically As Ordered By The Court

As has been hereinabove indicated, the 1974 Charlotte-Mecklenburg racial assignment plan and program, as ordered by the District Court, left nothing to generalities. It was controlled by the Court's specific directive that blacks should be assigned to each school, but should not constitute more than 50 per cent of the student body in any school. To achieve those specified objectives, however, each step to be taken was also specified — how many blacks and how many whites were to go from what schools and to what schools — and what would be the resulting numbers and percentages of blacks and of whites in each school.

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[1] Emphasis in original.

Thus it cannot be denied, and it is not denied, that in this case *the racial assignments and reassignments designated and specified by the District Court were put into effect in the Charlotte-Mecklenburg schools,* and that *the racial ratios prescribed by that Court were thereby brought about in each and all of these schools.*

At the hearing in this case, the Superintendent of the school system testified, on cross examination, that after the making of "pupil assignments" under the "Court requirements of 1974", the Charlotte-Mecklenburg schools "were in compliance with the [racial] ratios required by the Court Order" and that "after the Court requirements were imposed", the "black percentages were less than 50 per cent in all schools except the Hidden Valley school"[1]. Similarly, the Chairman of the defendant School Board, on cross examination, testified that "after the 1974 Court Order" was complied with, "there were no schools in the system higher than 50 per cent black except Hidden Valley"[2].

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[1] Joint Appendix, 352-353, 354.

[2] Joint Appendix, 391.

It will also be remembered that the School Board in 1975 so reported to the Court, and that all parties in *Swann* agreed to a dismissal of the case, and the District Court directed that the file "be closed".

Did there subsequently occur any official segregative actions or omissions which brought about variances from the prescribed and achieved racial ratios? The defendant School Board categorically states in its answer in the present case that "since the adoption of its 1974 pupil assignment plan, it has not committed any segregative acts or omissions whatever"[1]. The Chairman of the School Board, himself a black, testified on cross examination as follows:

> "Q. Under the heading of what are called demographic changes, that is people moving from where they were, families moving, children therefore leaving the schools that they had been attending, other people moving in, shifts in the population, black and white of this nature, was [this] the main thing that caused changes or variations in the black ratio percentages in the schools?
>
> "A. Yes, sir"[2].

Similarly, the Superintendent of the schools, on cross examination, testified:

> "Q. There had been, as you have already testified, I believe, a lot of moving in and moving out of the

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[1] Joint Appendix, 13.

[2] Joint Appendix, 392.

attendance areas and out of the various zones that fed pupils into the various schools, and those are called demographic changes, I believe?"

"A. Yes".

. . .

"Q. How is it possible, Doctor, to keep each school in the percentage, anywhere in the percentage of black that you have referred to, if demographic changes, and people moving in and out and around, result in the black ratio rising? How are you going to keep the schools, some schools, from rising..."?

"A. Using the same methods we've been using, I assume"[1].

The "same methods" of course means that which is here challenged, namely, the continual moving of pupils, according to their race, around and about among the schools, so as to re-establish and maintain perpetually in each and all schools a prescribed racial ratio. Against that, however, this Court has taken its stand, in *Brown*, in *Swann* and in *Pasadena*.

However, the District Court, in its decision, turns away from the obvious and unavoidable realities of demographic change. The Court suggests, for example, that if school buildings were differently located, in relation to the residences of pupils, that might prevent the development of changes in the racial ratios in the schools. In fact, however, that there is no method of selecting school building locations that will assure against changes in racial ratios among the pupils. For example, statistical exhibits in evidence in this case show that of eighteen Charlotte-Mecklenburg schools built in predominantly black residential areas, only two have ever exceeded the 50 per cent ratio limitation on black enrollment — whereas seven schools built in predominantly white residential areas have exceeded the 50 per cent ratio limitation on black enrollment.

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[1] Joint Appendix, 355, 380.

The District Court further declares that the Board's allowing of too many individual transfers of pupils, from one school to another, is a major factor in causing variances from prescribed racial ratios. The Court accepts, however, the testimony of the Chairman of the School Board that the great bulk of such transfers are the result of "residential changes". Yet the Court insists that if a transfer of a pupil would tend to affect "adversely" the racial ratio in a school, then the pupil shall not be allowed to transfer to another school — no matter that the pupil's residence has changed so that his transfer to the other school is completely justified. Such position is, however, permeated with the same fallacy as the concept that a dictated racial ratio, achieved by compulsory assignments according to race, must be forever maintained by additional and continuing racial assignments and reassignments.

> "Classifications based on race for purposes of transfer between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment".
>
> *Goss vs. Board of Education,*
> 373 U.S. 683, 687, 83 S. Ct.
> 1405, 10 L. Ed 2d 632, 635 (1963)

A still further proposition, put forward by the District Court's decision, is that to "some" extent, unstated and unknown, the racial reassignments here in question had purposes that were not racial, such as the accomplishing of improved utilization of an over-utilized or an under-utilized school. Yet, among the thousands of pupils who were reassigned, neither the Court nor the defendants pointed to any instance in which a pupil would have been reassigned had he been of a different race.

III.

The District Court Insistently Requires Ongoing Racial Ratios In The Charlotte-Mecklenburg Schools And "Continuing Control Over The Race Of Children In Each School"

The District Court does not by any means accept the limited "interim corrective" concept of racial school assignments. Both before and since this Court's decision in *Swann*, the District Court has repeatedly ordered in the Charlotte-Mecklenburg school system:

> "That the defendants *maintain a continuing control over the race of children in each school,* such as was done for many decades before *Brown vs. Board of Education,* and maintain the make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable" (emphasis added).
>
> . . .
>
> "That no school be operated with predominantly black student body".
>
> . . .

"The defendants are enjoined and restrained from operating any school for any portion of a school year with a predominantly black student body"[1].

This is not only a requirement, but is also an ongoing and permanent requirement, of a "particular degree of racial balance or mixing" which this Court in *Swann* "disapproved" and forewarned that it "would be obliged to reverse"[2]. It is precisely the sort of "in perpetuity" requirement which this Court thereafter, in *Pasadena,* did reverse.

IV.

The Court Of Appeals Has Ruled That, Whether Or Not The District Court Has Exceeded Its Power, The School Board Itself Has Power To Prescribe And Require Racial Ratios In Each And All Of The Charlotte-Mecklenburg Schools

Although the matters hereinabove outlined are the heart of this controversy, the Court of Appeals did not rule upon them. Instead, the plaintiffs' plea for constitutional protection against being reassigned from school to school because of their race, was rejected by the Court of Appeals entirely upon an "alternative" ground, namely, that the decision to impose the challenged racial reassignments "was reached independently and without regard to Court intervention and constituted a valid exercise of the Board's power over educational policy"[1]. "The School Board", said the Court of Appeals, "is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students"[2].

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[1] District Court's Orders of February 5, 1970, June 29, 1971, and July 30, 1974, in *Swann.*

[2] *Swann,* 402 U.S. 1, 24, 28 L. Ed 2d 554, 571.

It is to be noted that this pronouncement is not in any way limited to a situation, as in *Swann*, calling for or justifying "remedial" or "corrective" racial assignments. Nor has the Court of Appeals in any sense determined or ruled that such a situation presently exists in the Charlotte-Mecklenburg schools.

The broad proposition enunicated by the Court of Appeals is that since a school board has "discretionary powers over educational policy", therefore it may at any time, in the exercise of its discretion, put into effect programs under which pupils shall be assigned according to race, so as to create specified ratios of race in each and all of the schools under its jurisdiction.

There is, however, a fundamental fallacy in this proposition. It renders a school board — by virtue of its "educational policy" discretion — immune to the central mandate of *Brown*. As has been hereinabove emphasized, that mandate is that assignments to public schools shall be "on a non-racial basis". Yet the Court of Appeals' pronouncement is that a school board, though it is a governmental agency as truly as a court, may in its discretion do at any time what a court can do only in a *Swann* "remedial" situation, namely, assign pupils to public schools on a racial basis.

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[1] Appendix to this Petition, p. 3a

[2] Idem., p. 5a

Indeed, the defendant School Board, like most school boards, is an agency of state government, and as such is directly and specifically subject to the interdiction of the United States Constitution's Fourteenth Amendment, the fundamental authority on which *Brown* rests.

There is further irony in the Court of Appeals' holding that the defendant School Board can in its "educational policy" discretion make racial school assignments — even though the Court of Appeals, as it clearly states, has made no determination that there is here a "remedial" situation requiring or supporting such racial assignments. If the School Board — even in the absence of a *Swann* remedial situation — is immune to the *Brown* mandate that school assignments shall be made "on a non-racial basis", then the Board, or a successor Board, could some day arrive at a genuinely considered decision that "educational policy" would be wisely and beneficially served by making racial assignments upon ratios such as would tend greatly to diminish or eliminate racial integration in the school system.

Logically, such could certainly be a consequence of this concept that even though *Brown* prohibits racial ratio school assignments, a school board may nevertheless make racial ratio assignments as and when it sees fit, if in doing so it is acting upon "educational policy". The Petitioners respectfully submit, to the contrary, that under the non-racial mandate of *Brown*—except when a *Swann* "remedial" situation exists—no governmental authority, including a school board, has discretion, whether in the advancement of "educational policy" or otherwise, to make public school assignments on the basis of selections according to race.

There is yet another paradox in the declaration that whether a *Swann* "remedial" situation exists or not, the defendant School Board nevertheless has "educational policy" discretion to make school assignments on a racial basis. The Charlotte-Mecklenburg School Board, as pointed out above, is an agency of the State of North Carolina. North Carolina has a statute which provides that:

> "No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin".
>
> "... No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin ... "
>
> General Statutes of North Carolina
> Section 115-176.1

These North Carolina statutory provisions are obviously in harmony with the "non-racial" mandate of

Brown. However, just as "interim" exception is made to the *Brown* non-racial mandate in a *Swann* "remedial" situation, likewise a *Swann* "remedial" situation prevails over the "non-racial" mandate of North Carolina Statute.

Since, however, a *Swann* "remedial" situation requiring corrective racial assignments does not now exist in the Charlotte-Mecklenburg schools—as the record in this case specifically and conclusively shows and as the Court of Appeals does not question—therefore the "non-racial" mandate of this North Carolina Statute, paralleling the "non-racial" mandate of *Brown,* is in full force and effect and prohibits racial assignments. In other words, it is an obvious self-contradiction to say that the Charlotte-Mecklenburg School Board, a creature of North Carolina Statute, can exercise an "educational policy" or "discretion" directly contrary to the mandate of North Carolina Statute—in circumstances where there is no *Swann* "remedial" situation, and where the North Carolina Statute and its model, the *Brown* mandate, are consequently in full force and effect[1].

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[1] It will surely be agreed that the comment in *Swann*—to the effect that "school authorities are traditionally charged with broad power to formulate and implement educational policy", 402 U.S. 1, 16, 28 L. Ed 2d 554, 566, which might enable such school authorities to prescribe racial ratio in their schools as they see fit—could hardly be applicable where the school authorities are directly "charged" to the contrary by a State Statute which is now and in the present situation lawfully in force and effect.

V.

Summary

In dealing with a case such as this, it is absolutely necessary to recognize the compulsions which are in fact imposed in racial school assignments. For example, in *Swann,* when the same schools were before the Court as in the present case, this Court emphasized that:

> "Our objective in dealing with the issues presented in these cases is to see that school authorities exclude no pupils of a racial minority from any school, directly or indirectly, on account of race . . . "[1]

Yet that very objective was repudiated and violated on a wholesale basis in the racial reassignments which are the subject of the present suit. As has been hereinabove noted, 4,825 pupils were involved in the reassignments now at issue, altering the racial proportions in seventy-six of the Charlotte-Mecklenburg schools. Of these 4,825 pupils, 2,775 were black and 2,050 were white[2].

It is essential to understand that racial assignments, to achieve or re-achieve specified racial ratios among school pupils, involve compulsions upon both black and white pupils. Such assignments inevitably involve the excluding of various numbers of children, black and white, from some schools, "on account of race"—and the sending of various numbers of them, black and white, to other schools, "on account of race".

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[1] *Swann,* 402 U.S. 1, 23, 28 L. Ed 2d 554, 570.

[2] Plaintiffs' Exhibit 3, 490.

Under the reassignment program here at issue, the necessary meaning of the compulsion imposed upon each of thousands of pupils, black and white, is this:

> "Although you are otherwise qualified to attend this school where you have been attending or wish to attend, and although you would be allowed to attend here now were it not for your race, in order to alter the racial ratio in this school there should be less pupils of your race here—and in order to alter the racial ratio in another school there should be more pupils of your race there. Consequently, because of your race, you are excluded and barred from this school, and because of your race you are assigned to another school, and there you must go".

The whole situation and sequence thus stands in clear and stark relief. To bar a pupil from a school because of his race—or to compel him to go to another school because of his race—cannot be squared with the landmark decision in *Brown*, namely, that assignments to public schools must be "on a non-racial basis". Under *Brown* this right not to be barred from a school because of race nor sent to another school because of race is a constitutional right, derived from the Fourteenth Amendment to the United States Constitution and belongs to the individual pupil.

> "The rights created by the First Section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights".
>
> *Shelly vs. Kraemer,* 334 U.S. 1, 22, 68 S. Ct. 836, 92 L. Ed 1161, 1185 (1948)

Swann did establish that this constitutional right could be suspended, but only for an "interim", while racially integrative assignments are being made "in correction" of earlier racially segregative assignments.

Pasadena enforced this "interim" limitation, specifically holding that once corrective racial assignments had been put into effect as ordered, then further and continuing racial assignments are constitutionally invalid.

In the present case, involving the same schools which were before the Court in *Swann*, it cannot be denied that racial "interim" assignments have been put into effect specifically as prescribed by District Court Orders.

Nevertheless, racial reassignments are again being imposed upon Charlotte-Mecklenburg public school pupils, including the plaintiff pupils — the District Court adhering to the erroneous concept, and the defendant School Board apparently acquiescing therein, that the school authorities must "maintain a continuing control over the race of children in each school . . . and maintain the racial make-up of each school" and are "enjoined and restrained from operating any school for any portion of a school year with a predominantly black student body" — indefinitely and without end.

In such state of affairs, the plaintiffs are, by the supreme law of this land, entitled to protection against being thus compulsorily barred from schools, *because of their race*, or compulsorily assigned to other schools, *because of their race.*

It is firmly established as a fundamental precept of our constitutional law that government and governmental agencies, whether state or federal, shall place no restriction and no requirement upon any person because of his or her race. The plea now to this Court is that the promised and assured protection of that basic principle be no longer denied to these Petitioners.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Petitioners

APPENDIX

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 79-1586

George Martin, for himself and in behalf of his minor children, Ellen and Catherine Martin, et al.,
Appellants,

VERSUS

Charlotte-Mecklenburg Board of Education, et al.,
Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued May 5, 1980. Decided July 23, 1980

Before HAYNSWORTH, Chief Judge, BUTZNER and PHILLIPS, Circuit Judges.

Whiteford S. Blakeney (Blakeney, Alexander & Machen on brief) for Appellant; William W. Sturges (Hugh B. Campbell, Jr., Weinstein, Sturges, Odom, Bigger, Jonas & Campbell, P.A. on brief) and Julius L. Chambers (Karl Adkins, Chambers, Stein, Ferguson & Becton, P.A. on brief) for Appellee.

PHILLIPS, Circuit Judge:

Plaintiffs brought this suit for themselves and their children, students in the Charlotte-Mecklenburg school system, seeking to enjoin the Board of Education from implementing the Board's 1978 pupil reassignment plan. The district court denied plaintiffs' prayer for a temporary restraining order and an injunction, and this appeal followed. Concluding that the 1978 assignment plan is within the Board's plenary powers over educational policy, we affirm.

I

In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), the Supreme Court upheld a series of orders by the district court designed to implement desegregation of the Charlotte-Mecklenburg school system. In 1974 the School Board and a citizens group submitted a proposal for student reassignment to the district court. The proposed assignments were intended to result in no school with a majority of minority students (with one exception), and the proposal called for review and adjustment of pupil assignments every third year. The district court adopted the joint proposal and in 1975 removed the case from the active docket noting that existing orders continued in full force and effect. In 1978 the Board reviewed pupil assignments and reassigned 2,050 white and 2,775 black students out of approximately 78,000 students in the system. Plaintiffs sought to enjoin implementation of the 1978 plan on the theory that reassignments made to achieve a particular racial ratio violated their right to equal protection under the fourteenth amendment. Plaintiffs argued below that *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955), mandates that assignments to schools be made on a nonracial basis and that under *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the 1978 plan was invalid because a racially neutral attendance pattern was achieved in 1974. The district court held that a racially neutral attendance pattern had never been achieved and that certain of defendant's policies, including construction and school closing decisions, and a transfer procedure that was inadequately monitored, contributed to segregation. In the alternative the district court held that the Board's decision to adopt the 1978 plan was reached independently and without regard to court intervention and constituted a valid exercise of the Board's power over educational policy.

II

When an unconstitutionally segregated school system prohibited under *Brown I* exists, the school authorities are under an affirmative obligation to dismantle the dual system. If the school authorities default in their obligation, the "district court has broad power to fashion a remedy that will assure a unitary school system." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 16. When the system achieves compliance with *Brown I*, further judicial supervision over the school system is unnecessary unless school authorities deliberately attempt to segregate the schools by altering attendance patterns. *Id.* at 31-32. The school system in *Pasadena* was found to be unconstitutionally segregated in 1970, and the district court enjoined the school board to assign students in such a manner that no school would have a majority of minority students. The board complied with the order and reassigned students to achieve racial balance. In 1974 the school board sought relief from the requirement that no school have a majority of minority students, but the district court refused to modify its injunction. The Supreme Court reversed and held that *Swann* limited judicial remedial power to cases in which the school authorities have caused segregation. 427 U.S. at 434. In *Pasadena* there was no showing that the post-1970 changes in the racial composition of the schools were caused by the Board's actions. After racial neutrality in attendance patterns was achieved in 1970, the district court could not require yearly adjustment of student assignments to ensure racial balance. *Id.* at 435-37. The school board was, therefore, entitled to relief from the injunction to the extent that the order required alteration of attendance zones. *Id.* at 440.

Plaintiffs urge on this appeal that *Pasadena* prohibits the reassignment made in 1978. We conclude, however, that *Pasadena* is inapposite. The maintenance of the 50% limitation on minority assignments was admittedly a large factor in the Board's decision to reassign students in 1978. The 50% requirement is embodied in the joint proposal adopted by the district court in 1974, but the Board independently decided in 1978 to adhere to its commitment under the 1974 proposal. The district court did not intervene to coerce the reassignments, and the Board did not seek to be relieved of any outstanding order of the district court.

For these reasons *Pasadena* is inapplicable, and the validity of the Board's decision to reassign students in order to maintain racial ratios must be evaluated under principles enunciated in *Swann*. The School Board is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 16. The assignments made in 1978 were well within the plenary powers of the Board.

Because we conclude that the 1978 assignment plan was a valid exercise of the Board's powers, we do not address the alternate holding relied on by the district court. The judgment of the district court is affirmed.

AFFIRMED.

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